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No. 09-

IN THE

Supreme Court of the United States

TOM ROBINSON and ROBERT TYGARD,

Petitioners,

v.

CANDACE LEHMAN, Administrator of the Estate of Joshua Lehman,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Viewed in a light most favorable to plaintiff, was it objectively reasonable for defendant officers to believe the lethal risks presented by Lehman justified deadly force where Lehman nearly killed several officers in a pursuit, was non-compliant once stopped by a dangerous PIT maneuver, slashed at officers with a knife and backed up at full throttle nearly crushing an officer in an apparent attempt to hit the officer and escape while numerous law enforcement officers were around Lehman and rush hour traffic was stopped in both directions on a major highway?

(2) Were the defendant officers improperly denied qualified immunity when at the time of this incident, neither this Court nor any circuit court had ruled the Fourth Amendment is violated when an officer uses deadly force to protect innocent persons from significant risk of highly dangerous vehicular flight?

PARTIES

The parties to the proceeding in the court whose judgment is the subject of this petition include:

Petitioners: Officers Tom Robinson and Robert Tygard, who are City of Reno police officers, were defendants/appellants in the Ninth Circuit. Petitioners are individuals, thus no disclosures are required by Supreme Court Rule 29.6.

Respondent: Candace Lehman as administrator of the Estate of Josha Lehman, Deceased, is respondent herein and was plaintiff/appellee below.

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Officer Tom Robinson and Officer Robert Tygard respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The U.S. Supreme Court's order remanding the case to the Ninth Circuit for reconsideration is cited as *Robinson v. Lehman*, 552 U.S. 1172 (2008)(Supreme Court Docket No. 07-470). The order appealed from is the Ninth Circuit Court of Appeal's unpublished September 16, 2009 Memorandum order which appears in the Appendix to this Petition ("App.") at App. A, 1a – 2a, affirming its previous decision of April 16, 2007. The Ninth Circuit Court of Appeal's April 16, 2007 Memorandum opinion is unpublished and is found at App. B, 3a – 9a. The Minutes of the United States District Court for the District of Nevada denying, in part, defendants' motion for summary judgment appears at App. C, 10a – 13a. The District Court read its decision in open court and a transcript of the decision follows the Minutes at App. D, 14a – 67a. The Ninth Circuit's unpublished Order Denying Rehearing following the original appeal denial was filed on July 5, 2007, and is found at App. E, 68a – 69a.

JURISDICTION

The opinion of the Ninth Circuit was entered on September 16, 2009. App. A, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Candace Lehman as administrator of the Estate of Josha Lehman initiated this action as a civil rights claim for damages under 42 U.S.C. Sec. 1983. The Fourth Amendment to the U.S. Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

This is a Fourth Amendment civil rights use of deadly force case involving two police officers who shot and killed a driver to protect officers and prevent the driver's escape. The driver deliberately tried to run over officers, ran a stop sign onto a busy highway, nearly hit a motorcyclist when PIT stopped, and slashed a knife at officers. Negotiations failed to extricate the driver or his knife from the vehicle. Officers Tasered the driver and attempted to break his passenger window. He accelerated full throttle backward into an Expedition, almost crushing an officer when the defendants both fired shots killing him to protect officers they believed were likely between the vehicles and to prevent the driver's escape where he represented a serious risk of death or serious injury to any officer in his way and to the many rush hour motorists stopped nearby.

The Ninth Circuit upheld the District Court's denial of qualified immunity on summary judgment. App. B, 3a. The U.S. Supreme Court remanded in light of

Scott v. Harris, 550 U.S. 372 (2007). The Ninth Circuit reaffirmed its previous decision, but provided no analysis, merely stating that its viewing of the videotape did not change its mind and referring to its previous decision. App. A, 1a.

The opinion below illustrates how the Ninth Circuit continues to undermine this Court's consistent holdings relating to qualified immunity in civil rights cases. By improperly denying qualified immunity, courts deprive law enforcement officers of the protection they require to make reasonable split-second life and death decisions in the field.

This unfortunate incident occurred at rush hour on April 24, 2002, when Josha Lehman ("Lehman") was shot and killed by defendants, Reno Police Department (RPD) Officers Tom Robinson and Robert Tygard. The incident began when Washoe County Sheriff's ("WCS") Deputies Klier and Duncan responded to a report of a possible suicidal subject (later identified as Lehman) on Paddlewheel Drive. Paddlewheel connects to Andrews Lane, which in turn connects to U.S. Highway 395, a major thoroughfare between Reno and Carson City, Nevada. The caller reported he had tried to disable the subject's vehicle by removing a fuse. Lehman was replacing the fuse when Dep. Klier ordered him out. Lehman refused and Dep. Klier sprayed Lehman in the face with OC pepper spray to stop him from driving off, but to no effect.

Lehman rolled up the window and started the truck. Klier broke the window trying to gain access, then joined Duncan behind Duncan's vehicle, which was

blocking Lehman's four wheel drive pickup in the driveway. Lehman backed into Duncan's sedan. Lehman then drove forward 20 feet, reversed, and accelerated rapidly backward into the sedan pushing it at least 15 feet and disabling it.

Klier and Duncan believed their lives were endangered and fired 23 rounds at the engine and tires, flattening the tires but not disabling the vehicle. Bullets struck surrounding homes. Duncan reported a 10-78, shots fired, officer needs assistance, which was re-broadcast by dispatch over multiple law enforcement radio channels. Duncan and Klier then pursued Lehman in Klier's Ford Explorer at approximately 20 miles per hour.

Nevada Highway Patrol (NHP) Trooper Sean Giurlani responded to the call for help. He stopped in the middle of Andrews Lane and stood next to the door. Lehman accelerated to 20-25 miles per hour and came directly at Giurlani, who thought he was going to be struck. Giurlani fired his handgun at Lehman, but the bullet struck the windshield wiper and deflected. Giurlani jumped into his vehicle to avoid being struck by Lehman's vehicle.

Nevada Division of Investigation (NDI) Det. Sgt. Slobe responded to the 10-78 call on Paddlewheel in an unmarked Buick Regal. He went Code 3, activating his lights and siren, and turned from U.S. 395 onto Andrews Lane. He heard the description of Lehman's pickup just as he saw it. Lehman headed directly toward Slobe's vehicle in what Slobe believed was an attempt to hit him head-on. Slobe was forced to swerve off the road to avoid

being struck by Lehman's vehicle. Slobe's impression was that Lehman was in a fight mode, not merely a flight mode, and was attempting to hit him.

Dep. Klier tried a Precision Intervention Tactic or "PIT" stop on Paddlewheel, whereby the officer nudges the rear of a fleeing vehicle to one side, hopefully causing the vehicle to spin to a stop. However, Klier's Explorer was too light and had no effect on Lehman's pickup. Klier stated he attempted this maneuver because Lehman had already demonstrated a willingness to intentionally run into others, including himself, Duncan, Giurlani, and Slobe, and he wanted to prevent Lehman's access to U.S. 395.

Lehman turned north onto U.S. 395, running the stop sign during rush hour traffic. Klier hand signaled Trooper Giurlani to PIT stop Lehman's vehicle in Giurlani's heavier Expedition. Giurlani received permission by radio to PIT stop Lehman. The maneuver was partially successful in that Lehman was stopped. However, it caused Lehman to cross into oncoming traffic where he nearly collided with a southbound motorcycle visible on videotape.

Giurlani stopped his Expedition about four feet behind Lehman's pickup with both vehicles at right angles to the road. The front of Lehman's vehicle was near the curb. Dep. Stahl stopped his vehicle to the South of and slightly behind Lehman's vehicle a few feet away. Significantly, a hand held videotape taken immediately after the incident shows a mildly sloping embankment in front of Lehman's vehicle with sufficient room for Lehman's vehicle to drive forward onto the embankment and escape to the north or to the south.

Lehman immediately left his vehicle and approached to within 6 to 10 feet of Stahl and Giurlani with a raised knife in hand. Lehman was warned he would be shot if he continued. Lehman returned to the vehicle. Giurlani approached Lehman's vehicle, and Lehman lunged at Giurlani with a knife, forcing Giurlani to jump backward. Giurlani and Deputy Stahl attempted to talk Lehman into dropping the knife and giving himself up. Lehman remained in his pickup, which was still operable with the motor running, and never surrendered the knife.

Soon after the PIT stop, numerous officers arrived from several law enforcement agencies, including Defendant Officers Tygard and then Robinson. In addition to escape routes forward and north or south, the videotape shows gaps around the vehicles immediately north and east of Lehman that Lehman might have maneuvered through once he pushed the Expedition out of the way or went forward and then backward around it. From there, Lehman could resume his previous desperate escape attempt.

Attempts to talk Lehman down were ongoing, but unsuccessful. He did not exit, turn off his motor, or throw out his knife. Eventually, RPD Officer Bruton deployed a Taser through the broken driver's window, but one prong hit the pickup. WCS Dep. Wright fired a Taser and employed a 5 second burst. RPD Officer Magee deployed another Taser. Very close on the heals and possibly concurrently with the deployment of Tasers, several RPD Officers tried to break the passenger side window, planning to Taser Lehman from that side to avoid the knife. As they attempted to break the window, Lehman's vehicle roared to life and hurtled backward with all tires spinning.

RPD Officer Martin was positioned behind Lehman's vehicle and was forced to jump out of the way to avoid being hit or crushed as Lehman's pickup smashed into the Expedition behind it at an angle, knocking the Expedition backwards. Defendant Officers Robinson and Tygard were providing cover from positions in front of and behind Lehman's vehicle, respectively. Almost immediately, less than two seconds after impact and while all four wheels were still spinning full speed, Defendant Officers Robinson and Tygard fired their rifles, four shots each, in a matter of a second or two, immediately killing Lehman.

Officer Tygard initially heard Reno Police dispatch alert tones, which are used for serious calls. Dispatch advised of a Washoe County Sheriff's 10-78, Paddlewheel Road, shots fired. A Washoe Sheriff's vehicle had been rammed. The vehicle was fleeing the area and tried to ram an NHP trooper or vehicle with more shots fired. There was a pursuit northbound on U.S. 395. The suspect was armed with a fixed-bladed hunting knife that he waived around. Officer Tygard heard a radio report that Lehman had a gun and he was under the impression Lehman had shot at officers. Lehman was repeatedly ordered to drop the knife, put it on the dash, and come out, yet he continually failed to comply.

Tygard heard Lehman might be suicidal, although he may have learned that after the incident. The subject had not been stopped by shooting out the tires, but had to be PIT stopped as evidenced by the tire marks and position of the vehicle. Officer Tygard saw Lehman look all around, including backward and at him and the officers around him, apparently seeking to escape.

Tygard had determined that Lehman did have an escape route along the bank of the road northbound. Tygard was aware that there were many rush hour vehicles stopped, with civilians standing alongside the road in the escape path. There were also 10 to 15 persons along the west side of the highway near and to the north of the scene, presumably from nearby vehicles boxed in by events.

Tygard believed that the unsuccessful but painful deployment of the Tasers exacerbated the situation and made Lehman more of a threat in his escape efforts.[1] This increased Tygard's fear of what Lehman would do in his escape efforts. Officer Tygard saw Lehman reach up, shift the vehicle in reverse, stand on the accelerator, turn the steering wheel, and ram the Expedition Tygard was standing next to. Tygard was initially in harm's way and he was aware of multiple officers around Lehman's vehicle. When Tygard fired, he believed Lehman was still accelerating and the NHP vehicle was still being moved, apparently endangering those behind him and creating an escape route in that direction, too. Tygard believed the only way he could stop Lehman was to discharge his weapon to incapacitate him.

Lehman's tires were still spinning and engine fully revved when Officer Tygard stepped forward to the side of Lehman's window, and fired in a downward direction into the chest area. The downward direction provided some protection against an errant shot hitting an officer

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1. Tygard and Robinson were not involved in the decision to use Tasers. Once the Tasers were employed, Tygard and Robinson could only react to Lehman's actions as they existed.

or bystander. Tygard was concerned that this protection would be absent once Lehman broke free to the rear or moved forward. At no time did Lehman cease his escape attempt prior to the shots being fired.

When Tygard stepped forward and fired, he knew Lehman had made extreme efforts to escape before, including ramming vehicles and endangering officers to such an extent that officers had fired at Lehman. Tygard reasonably believed Lehman intended to seek to escape either continuing backward or driving forward and turning north along the west side of Highway 395, that he had little regard for the lives of officers, that he had used his vehicle in a potentially lethal manner several times already, that prior efforts to stop Lehman's vehicle with bullets had been unsuccessful and a PIT stop, if available, would be extremely dangerous with the large number of civilians and officers in any pathway Lehman chose. The officers and bystanders faced a serious risk of being killed or injured by Lehman's escape efforts. Tygard did not believe the three NHP officers to the north would have any capability of protecting the people in that area. Tygard reasonably believed shooting Lehman was the only way to safely stop him from harming others.

When Officer Robinson fired, he reasonably believed that Lehman posed a lethal threat to officers and civilians in the immediate area. From radio traffic, Robinson mistakenly, but reasonably, believed Lehman had fired shots at officers, who had called for emergency assistance. He knew Lehman had not stopped despite his vehicle's tires being shot out. He was aware of a lengthy chase that ended only when Lehman was forced

into oncoming traffic. He saw Lehman chop his knife toward officers and disobey orders to exit. Robinson had seen officers immediately behind Lehman's vehicle. Robinson saw Lehman look around and believed Lehman knew officers were immediately behind him and was assessing whether he could hit them. Robinson was in front and to the right of Lehman's pickup when he saw Lehman stand on the accelerator in reverse.

Robinson could see Lehman had escape paths in front of him along the highway shoulder. Robinson believed Lehman was trying to kill the officers behind him because he accelerated at full speed toward the officers behind him rather than using the easier escape path forward. Almost simultaneous with firing his weapon, Officer Robinson saw one officer barely escape being crushed by jumping out from between Lehman's pickup and the Expedition. Robinson knew other officers were nearby and believed additional officers might be immediately behind Lehman's vehicle, possibly already crushed between the two vehicles while the pickup's wheels were still spinning. Robinson fired in an attempt to protect those officers.

Robinson was also aware of officers and pedestrians immediately behind the Expedition and he was aware of at least three pedestrians nearby to the front. Robinson believed Lehman was trying to escape to the rear or would then drive forward and to the North. Because of Lehman's efforts to harm the officers behind him, Robinson believed the lives of the persons in these escape paths were also in danger. Because of crossfire issues, Robinson believed he was the only person in a position to fire since he could fire somewhat downward

from close range, and believed shooting Lehman was the only way to stop him.

The videotape was presented as Exhibit "A" to Defendants' Motion for Summary Judgment. Defendants ask this Court to request and review the exhibit. The one exhibit actually includes two separate videotapings, one following the other. The first videotaping was from a camera mounted in front of a highway patrol officer's vehicle. The second videotaping on the exhibit was taken by NDI Det. Sgt. Slobe using a handheld camera. It depicts most of the events following the PIT stop, including the Tasering, window breaking efforts and Lehman's acceleration. The shooting is not depicted because Slobe ducked in obvious anticipation of gunshots. Swope walked around Lehman's vehicle after the shooting with his video camera. This segment depicts routes an objective officer could reasonably believe constitute escape routes: forward onto the road bank and then either north or south along the embankment to the highway; or backward through several cars onto the east lanes of the highway, and then either north or south along the highway. The two videos also depict neighbors in the yards, officers amongst the cars, and numerous vehicles stopped in the southbound lanes near the scene, and in the north bound lanes a hundred yards or so to the south of the scene.

In addition to the clear evidence of the videotape, Officers Giurlani, Slobe, McMillin, Almaraz, Bruton, Wright, Scichilone, Robinson, and Tygard believed Lehman had one or more escape paths forward or to the rear. A number of officers on the scene also believed

the use of lethal force was reasonable under the circumstances, including officers Giurlani, Slobe, Almaraz, Martin, Bruton, Stahl (50-50 chance he would have fired, too), Robinson and Tygard.

Officer Robinson and Officer Tygard petition this Court for review of the Ninth Circuit's decisions denying them qualified immunity.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision departs so significantly from the standards of this Court that this Court's supervisory authority is required. The Ninth Circuit failed to apply the objective officer standard, ignored clear evidence in a videotape regarding the existence of what an objective officer could reasonably believe were escape routes, and on the issue of whether cases then in existence provided fair notice of the constitutional standard, the Ninth Circuit relied on cases with significantly dissimilar facts and ignored cases with very similar facts. The Ninth Circuit's decision conflicts with decisions of other circuits and with this Court's decisions in *Harris*, *supra*, and *Brosseau v. Haugen*, 543 U.S. 194 (2004), as discussed below.

In *Haugen*, this Court suggested a need for more judicial guidance in this heavily fact dependent area to help officers and the courts find the "'hazy border between excessive and acceptable force.'" *Haugan*, 543 U.S. at 201, quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001).[2] This case involves videotape evidence, a partially

2. This Court could also proceed directly to the second prong of the qualified immunity analysis. *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

disabled but still lethal vehicle, a possibly suicidal subject, a history of reckless endangerment without a high speed chase, whether the "split-second" decision making standard is appropriate after negotiations commence when the subject is Tasered and suddenly accelerates, and other facts which provide a setting for this Court to provide guidance as to the weighing of these factors.

Finally, this case has significant public policy implications for law enforcement officers because it promotes an apparent unarticulated policy[3] in the Ninth Circuit that Fourth Amendment use of deadly force pursuit cases will proceed to jury trials despite the policy considerations underlying qualified immunity.

I. The Ninth Circuit Decision is Contrary to and so far Departs from the Accepted and Usual Standards Applied by This, and Other Courts, that this Court's Supervisory Power is Called for on the Issue of Whether a Constitutional Violation Occurred.

This Court remanded this case for reconsideration in light of *Scott v. Harris*, 550 U.S. 372 (2007). *Harris* held the test is reasonableness and the *Tennessee v. Garner*, 471 U.S. 1 (1985) standard merely recited factors. Additional factors include culpability and the number of persons at risk. Police need not let a subject

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3. The *Lehman v. Robinson* decision is not officially published. However, it is still available for law enforcement and their legal council on Lexis and presumably Westlaw. *See* 228 Fed. Appx. 697; 2007 U.S. App. LEXIS 8978.

continue his dangerous behavior in hopes he will stop, as this practice will encourage reckless conduct. *Harris*, at 384-85. *Harris* also held that an issue of fact cannot be created where a videotape clearly establishes a point. *Id.*, at 380.

The most critical factual issue in this case is whether an objective officer in the defendants' positions could reasonably believe Lehman was not contained and could have escaped by several routes if not immediately stopped. The Ninth Circuit found:

> Several other officers present testified that they had Lehman "boxed in" when he was shot. One officer said: "[m]y immediate response was just to contain the situation, which we did." *When viewed in the light most favorable to Lehman*, the record suggests that Lehman had no readily available avenue of escape and was contained. (Emphasis added).

App. B, 6a.

The Ninth Circuit erred twice. First, it found no escape route existed *in fact*. The Ninth Circuit failed to consider that, while the evidence must be viewed in a light most favorable to Lehman, it also must also be viewed from the standard of what an objective officer could reasonably believe. *Graham v. Connor*, 490 U.S. 386, 399 (1989) (the test is "objective reasonableness"); *Saucier v. Katz*, 533 U.S. 194, 204 05 (2001); *Robinson v. Arrugueta*, 415 F.3d 1252, 1255 (11th Cir. 2005)("the determination of reasonableness must be made from the

perspective of the officer.")(*Cert.* denied 546 U.S. 1109 (2006)). If a reasonable officer could believe his actions were justified, the officer is entitled to qualified immunity, notwithstanding that reasonable officers could disagree on this issue. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872 (9th Cir.1993). Both defendants and many more officers believed Lehman was trying to escape when he backed up. The Ninth Circuit failed to consider whether an objective officer could reasonably believe Lehman was not contained as escape routes existed and all prior efforts to stop him by shooting at the vehicle and tires had been ineffective. Robinson also believed Lehman was trying to crush officers he believed were behind the vehicle. One was and there might have been others.

The Ninth Circuit compounded its error by failing to make any finding upon viewing the videotape of whether or not the videotape unequivocally establishes that a reasonable officer could believe escape routes existed. Defendants submit that if this Honorable Court takes the time to review the second segment of the videotape following the shooting, the video will establish that an objective officer could reasonably believe escape routes existed for Lehman. The assessment of the videotape is supported by the testimony of defendants and multiple other officers on scene that Lehman was not contained and had escape routes, and they would have shot, too.

Harris holds that officers are not required to let a dangerous suspect simply drive away in hopes that they will stop their reckless endangerment. "We think the police need not have taken that chance and hoped for

the best." *Harris*, at 385. As *Harris* discussed, there could be no certainty Lehman would stop his efforts to escape. The risk presented by Lehman was far greater than that presented in *Harris* where this Court stated the constitutional question was "easily decided". *Harris*, at 378, n. 4.

The Ninth Circuit ignored *Harris* when it stated: "Lehman was not suspected or accused of any crime." App. B, 6a. In *Harris*, it was not the initial speeding (73 in a 55 mph zone) that justified lethal force, it was Harris' subsequent actions during the chase. Here, deputies were lawfully investigating a suicide threat when Lehman engaged in a course of conduct that created probable cause to believe Lehman had committed multiple serious crimes and that if he were allowed back onto the highway, he would continue to engage in highly reckless conduct that would create a serous risk of death or serious bodily injury to pursuing officers, pedestrians and motorists.

These crimes included, at a minimum: assault with a deadly weapon (motor vehicle, knife) and assault on an officer in the performance of his duty, both felonies (Nevada Revised Statutes (NRS) Sec. 200.471); attempted murder or manslaughter, felonies (NRS 200.010, NRS 200.040 and NRS 193.330); resisting a police officer with a deadly weapon, a felony, (NRS 199.280); running a stop sign (NRS 484.278); and reckless driving (NRS 484.377). The Ninth Circuit's decision essentially directs officers to ignore conduct during pursuit if the initial stop did not involve a serious crime. This creates a dangerous precedent and is contrary to *Harris*.

The Ninth Circuit found it significant that because two officers had begun a dialogue with Lehman, deadly force was unreasonable. App. B, 6a – 7a. This focus on a dialogue ignores several points in the defendants' legitimate risk assessment. First, Lehman was non-compliant; despite orders, he had not thrown out the knife, stopped the engine, or exited the vehicle and accelerated backward toward an officer in an apparent escape attempt. Second, the analysis must focus on the officers' knowledge at the time the shooting occurred. Dialogue was over. Lehman had just been Tasered twice and officers were attempting to break through the passenger side window.[4] Lehman looked around and behind him and accelerated backwards almost striking an officer. Lehman's tires were still spinning full speed when the shots were fired. The lower court's analysis focuses on the irrelevant and ignores the suddenly escalating conduct and risk. In *Graham v. Connor*, 490 U.S. 386, 396-97 (1989), the court noted:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The

4. These defendants did not participate in making or carrying out the decision to Taser Lehman or to break the passenger window. Accordingly, they cannot be held liable for that conduct and must react to the situation that now faced them; one in which they believed the Tasering made Lehman more dangerous. *See Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002) (bad tactics leading to escalated need for force do not create a constitutional violation); *Monell v. Dep't of Social Services*, 436 U.S. 658, 693 (1978) (no *respondeat superior* liability).

> calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

On remand, the Ninth Circuit was to balance the risk of nearly certain death by shooting against the risk of death or serious bodily injury to officers and others, including their relative culpability and the number of persons at risk. The Ninth Circuit failed to provide any meaningful analysis. Here, Lehman recklessly endangered numerous officers and by running the stop sign and spinning into oncoming traffic during the PIT stop, he recklessly endangered the lives and limbs of numerous members of the public, all of whom were innocent. Lehman was almost completely non-compliant. While his vehicle was slowed by shot-out tires, Lehman nevertheless nearly killed or seriously injured Trooper Giurlani, NDI Det. Swobe, a motorcyclist during the PIT stop, and Officer Martin. Officers testified PIT stops are inherently dangerous, and this case almost proved that when Lehman narrowly missed a motorcycle visible in the video. The defendants and other officers reasonably believed the only way to stop Lehman from hitting officers nearby or going back onto the highway and risking further deadly incidents was to shoot him.

The Ninth Circuit's decision is contrary to the holdings of other circuits. In *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009), an officer fired from close range as the driver passed by him. There were no motorists in the immediate vicinity, yet the court found the driver's

previous recklessness likely justified the lethal use of force, in part because of a perceived risk to pursuing officers. Cordova drove a large vehicle which the court thought presented a high level of risk. Here, a reasonable officer could believe Lehman's powerful four-wheel drive truck presented a heightened risk, despite its lack of high speed. Events had already proven that, plus there were large numbers of officers and motorists on the road. While the *Aragon* court came just short of finding no constitutional violation, it did grant qualified immunity:

> The law in our circuit and elsewhere has been vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death. Given that our precedent does authorize the use of deadly force when a fleeing suspect poses a threat of serious harm to others, Officer Aragon was not unreasonable in believing that a potential threat to third parties would justify such a level of force.

Aragon, at 1193.

In *Long v. Slayton*, 508 F.3d 576 (11th Cir. 2007), *cert.* denied, 129 S. Ct. 725 (2008), no constitutional violation was found where a potentially psychotic person, having exhibited no violence, ran from an officer into the officer's marked vehicle, was warned to get out or be fired upon, and was fatally shot as he tried to drive off. The court recognized the government has a strong interest in protecting the innocent public and found flight in a marked police vehicle increased this risk

sufficiently to make use of deadly force reasonable, even though there was no direct immediate threat to anyone and backup officers were en route. As the court noted: "the threat of danger to be assessed is not just the threat to officers at the moment, but also to the officers and other persons if the chase went on." *Id.*, at 581, quoting *Pace v. Capobianco*, 283 F.3d 1275, 1280 n.12 (11th Cir. 2002).

In *Troupe v. Sarasota County, Florida*, 419 F.3d 1160 (11th Cir. 2005), *cert.* denied 547 U.S. 1112 (2006), SWAT Officers surrounded the decedent's vehicle in his driveway and other SWAT officers blocked the surrounding streets. The decedent, wanted for murder, moved his car forward and backward, making a way to escape the immediate containment. One officer fired at the vehicle in an unsuccessful attempt to stop the vehicle. Another officer fired twice, hitting the driver once, while successfully moving to the side to avoid being hit. The Eleventh Circuit found no constitutional violation. Plaintiffs argued there was no need for deadly force because the officers were able to get out of the way before shots were fired, there were no officers immediately in front of the vehicle when the shots were fired, and the decedent was contained by the roadblocks. The court found this unpersuasive. It noted there were officers nearby who the defendant could reasonably believe might be injured. Further, if Hart's escape had been successful, his path of flight "could have posed" a threat of death or serious injury to the public or to other members of the SWAT Team". *Id.*, at 1168. Citing *Graham*, 490 U.S. at 396-97, the court found unpersuasive plaintiff's argument that the mere possibility of harm was insufficient and that witnesses

said there was no one in the decedent's immediate path. *Troupe*, 419 F.3d at 1168.

Troupe noted the officers had only 3-5 seconds to make their decision. In the instant case, there was even less time. The court also noted, as in the instant case, that several officers on the scene believed lethal force was necessary. As the court stated, "[e]ven if in hindsight the facts show that the SWAT Team could have escaped unharmed, a reasonable officer could have perceived that Hart posed a threat of serious physical harm." *Id.* In footnote 8, the *Troupe* court observed:

> In *Brosseau*, citizens and other officers were in the immediate area and were at a high risk of harm if the suspect had escaped. *Id.* In the present case, the streets were blocked, which created less possibility of harm to innocent citizens. Nonetheless, the Oldsmobile was surrounded by Officers who were at risk and the car did end up breaking out of the driveway and getting onto a main road. Bauer [the defendant in *Troupe*] was aware at the time of the shooting that other surveillance officers were only a short distance away. He also knew that citizens could be on the main street and could be harmed. Thus, Bauer believed there was an immediate risk of harm to the general public.

Troupe, 419 F.3d at 1169, n 8.

Williams v. City of Grosse Pointe Park, 496 F.3d 482 (6th Cir. 2007), did not involve a high speed chase. Nevertheless, the court found no constitutional violation. Two police vehicles boxed in a suspected car thief. The driver accelerated backward into a cruiser. An officer left his vehicle and placed a gun to the driver's head. The driver accelerated forward onto the sidewalk to go around the vehicle in front of him, knocking down the officer with the gun. The remaining officer then fired several times as the vehicle tried to drive away. *Id.*, at 484. The court noted:

> From Miller's perspective, Williams: (1) was undeterred by having a weapon pointed at his head; (2) acted without regard for Hoshaw's safety; (3) was obviously intent on escape; and (4) was willing to risk the safety of officers, pedestrians, and other drivers in order to evade capture. *Miller had no way of knowing whether Williams might reverse the Shadow, possibly backing over Hoshaw, or cause injury to other drivers or pedestrians in the area.* As a consequence, Miller elected to fire his weapon in order to prevent Williams's potentially causing someone injury. That Williams may not have *intended* to injure Hoshaw or anyone else is immaterial. From Miller's viewpoint, Williams was a danger, and he acted accordingly.
>
> . . . While there are no pedestrians or vehicles in the immediate field of view of the camera in Miller's cruiser, there can be no question that Williams's reckless disregard for the

> safety of those around him in attempting to escape posed a threat to anyone within the vicinity. Finally, Williams was actively avoiding arrest, apparently doing all he could to evade capture by the police. While the suspected crime was a nonviolent property offense, the immediate threat Williams posed to Hoshaw and other drivers and pedestrians and the fact that Williams elected to flee both suggest that Miller's chosen use of force to apprehend Williams was reasonable. (Emphasis added).

Williams, at 487.

In *Lytle v. Bexar County Tex.*, 560 F.3d 404 (5th Cir. 2009), qualified immunity was denied following a high speed chase. *Lytle* is distinguishable and instructive. The officer began following a suspected armed car thief who accelerated to 65 in a 30 zone, turned too wide on a corner and crashed into a vehicle. The suspect backed toward the officer's car, then accelerated forward in an un-crowded area. The court noted that if the officer fired while the vehicle was backing toward him *or immediately afterward*, he would be entitled to qualified immunity. *Id.*, at 412. In the instant case, the officers fired within 2 seconds of Lehman's movement; a movement which objective officers could reasonably believe was an attempt to injure officers or to escape.[5] This leaves no time for reflection or cooling off and renders the officers' firing reasonable.

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5. Plaintiff argued the Tasers may have caused Lehman's muscles to spasm. This is irrelevant since it is the officers' reasonable interpretations which are the measure.

The officer in *Lytle* fired at the vehicle when it was 3-4 houses down the block, killing a passenger. In denying qualified immunity, the court found the pre-shooting conduct did not indicate sufficient depravity, when coupled with the lack of traffic or bystanders, to make the driver a sufficient risk to warrant shooting once the driver was several houses away. This was especially true since the risk of hitting innocent persons was greatly enhanced by the distance at the time of shooting.

In the instant case, if officers had waited until Lehman was roaming the highway once again, then the concerns of the *Lytle* court (and the officers testifying in this case) come into play that efforts to stop the danger become themselves more dangerous to the very public they are trying to protect. The defendant officers took this into account. Lehman exhibited a much greater level of depravity than the *Lytle* suspect, having deliberately tried to hit multiple officers and vehicles and slashing a knife at one officer. U.S. 395 at rush hour also presented a much greater risk than the quiet road in *Lytle*.

In *Marion v. City of Corydon*, 559 F.3d 700 (7th Cir. 2009), stop sticks deflated 3 tires during a high speed chase, reducing the speed to 40 miles per hour. The driver tried to cross a muddy highway meridian and lost substantial traction. Numerous officers closed in on the driver, and shot at him when he moved forward, and again when he moved backward in their direction. It was unknown which shots struck him. The plaintiff contended Marion no longer constituted a danger because his tires were flat, his vehicle overheating,

officers surrounded him, and he was essentially stuck in the mud.

Despite plaintiff's contentions, it was reasonable for the officers to determine that Marion did actually pose a threat to the safety of officers and of innocent bystanders. Marion drove on three flat tires at fairly high speeds for a significant stretch of time. Even after he entered the median and officers on foot surrounded his vehicle, the video evidence shows that Marion's vehicle continued to move forward, and then backward. A reasonable officer could have concluded that, absent police intervention, Marion had the capability to run over officers and/or to reach the eastbound lanes of the highway and that if he did reach the eastbound lanes, there was a significant possibility that Marion would have rammed one or more bystander's vehicles or caused an accident between bystanders' vehicles, injuring or killing them. *Marion*, at 705-706. The court did not require the officers to wait and see if Marion could escape from the mud and meridian before firing.

In *Robinson v. Arrugueta*, 415 F.3d 1252 (11th Cir. 2005), no constitutional violation was found where the subject was fatally shot while the vehicle was moving 1-2 mph toward an officer despite the estate's claim the officer could have moved away.

In *McCollough v. Deleon*, 559 F.3d 1201 (11th Cir. 2009), the court stated:

> McCullough's initial attempts to evade police, his failure to heed police warning of the potential use of deadly force, his later attempt

> to drive a truck towards an officer on foot, and his still later apparent attempt to drive away from the officers toward the exit of the parking lot provided the officers with sufficient reason to believe the use of deadly force was necessary.

Id., at 1208.

In summary, the risk Lehman presented to an objective officer, given Lehman's relative culpability and the target rich environment of officers and motorists around him and the demonstrated inability to safely stop Lehman by any other means, an objective officer could reasonably believe the force used was reasonable. Officer Robinson also believed there were one or more officers between Lehman's vehicle and the Expedition it crashed into and had no cooling off time as Martin dove aside. No constitutional violation occurred and the defendants are entitled to qualified immunity under the first prong. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

II. The Ninth Circuit Decision so far Departs from the Accepted and Usual Standards Applied by This, and Other Courts, that this Court's Supervisory Power is Called for on the Second Prong of Qualified Immunity.

The second prong of qualified immunity requires the court to determine whether the law was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The cases must provide fair notice of what conduct was required. "The relevant, dispositive inquiry in determining

whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*, at 202.

The Ninth Circuit cited two cases in finding the law was clearly established, *Acosta v. San Francisco*, 83 F.3d 1143, 1147 (9th Cir. 1996), *cert.* denied, *Yawczak v. Acosta*, 519 U.S. 1009 (1996), and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) *cert.* denied, *Rutherford v. Deorle*, 536 U.S. 958 (2002). Neither of these cases provided defendants with reasonable notice their conduct was unconstitutional, as required to avoid qualified immunity.

In *Acosta*, an off duty officer heard screams from a woman and saw two men run to their vehicle carrying a purse. The officer stood in front of the vehicle and shot the driver while he was moving toward him so slowly that he could easily have stepped aside. In assessing risk, *Acosta* presented no history of life endangering conduct similar to this case, no history of noncompliance, and no other officers or third persons whose lives were endangered. These facts provided no relevant guidance to Officers Robinson and Tygard.

Deorle provided even less guidance. It did not involve a motor vehicle. There was no immediate history of conduct endangering officers or citizens. An unarmed emotionally disturbed[6] person walked slowly toward an

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6. The court noted the governmental interest in using force is diminished where the suspect is mentally or emotionally disturbed, but declined to adopt a *per se* rule. *Deorle* at 1283. *Deorle* was clarified in *Blanford v. Sacramento County*, 406 F.3d

(Cont'd)

officer armed with a beanbag round who was secure behind a tree and could easily withdraw. Numerous other officers were present, although not close to the subject or threatened. The officer gave no warning[7] and fired when an undisclosed imaginary line was crossed, hitting the subject in the eye. This case and *Deorle* involve completely dissimilar facts and risk assessments.

While the presence of many officers may create a safe situation in some circumstances, their tools were unavailing here. Pepper spray and Tasers were unsuccessful. Shooting the vehicle and its tires was unsuccessful. PIT stopping Lehman endangered motorists and officers. Officers testified shooting Lehman at level or from a distance endangered officers and motorists. In *Haugen*, the officer shot because she anticipated officers would be responding in the general area of Haugen's escape path and could then be at risk. *Haugen*, 543 U.S. at 196-197.

(Cont'd)

1110, 1117 (9th Cir.2005). There, a sword bearing person appeared unstable. An officer shot him when he appeared headed into a residence for fear of the safety of possible occupants. While the court noted the possibility of the suspect being mental disturbed was a factor, the subject "was armed with a dangerous weapon and it was not objectively unreasonable for them to consider that securing the sword was a priority." *Id.* at 1117. Securing Lehman's car was a similar priority.

7. The District Court found it unlikely that any warning could have been given as events occurred too quickly. App. D, 40a. Further, Lehman had been fired at by three officers already. Since weapons were pointed at Lehman, any reasonable officer could believe no more warnings were necessary.

Acosta and *Deorle* provide no guidance or notice that the actions of Officers Robinson and Tygard were unreasonable. However, other cases existed that strongly supported the reasonableness of Officer Robinson and Officer Tygard's actions.

In *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), Officer Schulcz saw Smith run a stop sign and the chase was on at speeds exceeding 90 mph. Smith became temporarily stuck in rough terrain and Officer Schulcz attempted to block him. Smith maneuvered around Schulcz' and resumed flight, once swerving toward Schulcz's police car. Smith turned down a dead-end street. At the end of it, he tried to turn around by going into a yard. Officer Schulcz placed his vehicle nose to nose to block Smith and exited to apprehend Smith. Smith backed up, then drove forward, smashing into Schulcz's car, backed up again, and drove around Schulcz's car. Officer Schulcz, not in personal danger, shot and killed Smith as he drove by. Evidence existed that when he fired, Officer Schulcz was aware the dead end street had been blocked by other law enforcement vehicles. Significantly, the court rejected the argument that since Smith was surrounded, he no longer presented a risk sufficient to justify deadly force. "Even if there were a roadblock at the end of Woodbine Avenue, Officer Schulcz could reasonably believe that Mr. Smith could escape the roadblock, as he had escaped several times previously." *Id.*, at 347. "Had he proceeded unmolested down Woodbine Avenue, he posed a major threat to the officers manning the roadblock. *Even unarmed*, he was not harmless; a car can be a deadly weapon." (Emphasis supplied). *Id.*, at 347.

The Ninth Circuit tried to distinguish *Freland* because it involved high speed and because police believed the driver may have a gun. App. B, 9a. The Ninth Circuit erred. There is no indication in *Freland* that the police believe the driver was armed. To the contrary, it stated: "Even unarmed, he was not harmless . . ." *Freland*, at 347. Further, any reasonable officer could believe Lehman's vehicle presented a very high risk of harm given the facts leading up to this incident and the number of people in the near vicinity and on the road.

In *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000), no constitutional violation was found where, after a fleeing car crashed into a guardrail, the officer shot into the car as it began to resume flight.

In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), no constitutional violation was found where officers shot the driver of a speeding tractor-trailer truck who had made multiple dangerous maneuvers toward officers and other motorists.

In *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir., 2002), like here, the suspect was unfazed by pepper spray. The suspect avoided one police barricade by driving at an officer's vehicle. The officer moved out of the way to avoid being struck. Four police vehicles blocked the sides and back of the suspect's vehicle when he entered a cul-de-sac and kept the motor running. Three officers exited their vehicles, shouted get out of the car and fired 11 rounds within moments of arrival. The court stated:

> Given the facts in the light most favorable to Plaintiff, reasonable police officers could have

> believed that the chase was not over when the police fired on Davis. Even when we accept the Hedge affidavit as true that Davis's car, in the cul-de-sac, did not try to run over the deputies and that Davis, in the cul-de-sac, did not aim the car at the deputies, Davis's car was stopped for, at most, a very few seconds when shots were fired: no cooling time had passed for the officers in hot pursuit.

Pace, at 1282.

In the instant case, defendants were entitled to believe the chase was just beginning. Two seconds cooling off was insufficient to fully assess the situation and allow second guessing by the Ninth Circuit, especially in light of existing case law.

Brosseau v. Haugen, 543 U.S. 194 (2004) assessed existing case law at a point in time close to this incident. In *Haugen*, an officer received reports of and observed a fight. She directed two suspects into one vehicle and the witness and her daughter into another vehicle, both vehicles being generally toward the front of a jeep. Haugen ran into the jeep. Officer Brosseau broke the window and a brief struggle ensued. Haugen started the jeep and drove forward trying to escape. Brosseau jumped back and while not in danger, fired, striking Haugen in the back, who nevertheless negotiated through the narrowly spaced vehicles, through a lawn, and out to the street. Officer Brosseau fired because she was "fearful for the other officers[8] on foot who [she]

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8. Two other officers and a canine were at the scene, although Haugen did not know their location.

believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area." *Haugen*, 543 U.S. at 197.

The Ninth Circuit adopted the District Court's analysis to distinguish *Haugen*. App. B, 9a. The District Court cited a number of factors as distinguishing *Haugen*. App. D, 47a to 48a. One supposed distinction was its finding that, in a light most favorable to plaintiff, Lehman was contained. As with the Ninth Circuit, the District Court failed to consider whether a reasonable officer could believe escape routs existed and that Lehman was not contained. The videotape shows a reasonable officer could believe Lehman could escape.

Other factors relied upon by the District Court noted hereafter also fail to adequately distinguish *Haugen*: 1) The District Court said Haugen had an outstanding felony warrant. However, Officer Brosseau was not aware of the warrant. 2) Many officers were present with Lehman. However, this indicates the risk to officers was virtually nill in *Haugen*, whereas while attempting to get back to the road and, if allowed to do so, Lehman represented a very high risk to officers and others. Officers' previous attempts to physically stop and restrain Lehman were unsuccessful. Robinson also thought officers were between Lehman and the Expedition. 3) Haugen's tires were not shot out. However, in *Haugen* there were no bystanders or other vehicles threatened other than those in the two vehicles Haugen avoided. The first was only 4 feet away, so it would have been avoided already when Brosseau fired. Further, Lehman's vehicle was still deadly. 4) Brosseau

only fired one shot. However, no then-existing case gave notice the number of shots is relevant where there has been no change in circumstances justifying the first shot. 5) Haugen was not suicidal. However, even someone suicidal may kill people. What the District Court ignored is that Haugen did not engage in a pattern of life threatening conduct like Lehman did. The risk to officers and the innocent public was far greater from Lehman than from Haugen.

The facts in *Haugen* occurred on February 20, 1999.[9] The only case this writer found between then and this incident on April 24, 2002, is *Pace v. Capobianco*, discussed above, which provides support for qualified immunity. The law existing at the time of this incident strongly supported the notion that Officers Robinson and Tygard acted constitutionally. No case gave them fair notice otherwise. Under these circumstances, defendants are entitled to qualified immunity. As the court stated in *Haugen*, at 201:

> These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the "'hazy border between excessive and acceptable force.'" *Saucier v. Katz, supra, 533 U.S. at 206, 150 L. Ed. 2d 272, 121 S. Ct. 2151.* The cases by no means "clearly establish" that Brosseau's conduct violated the *Fourth Amendment.*

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9. See *Haugen v. Brosseau*, 339 F.3d 857, 859 (9th Cir. 2003).

The forgoing cases clearly demonstrate that Officer Robinson and Officer Tygard acted reasonably and did not violate Lehman's constitutional rights. At the very least, the cases failed to provide fair notice to Robinson and Tygard that their actions were unconstitutional. As a matter of law, their conduct fell within the "hazy border between excessive and acceptable force." *Haugen*, 543 U.S. at 201. The Ninth Circuit decision is clearly not in accord with other circuits or with this Court's holdings in *Haugen* or *Harris*.

CONCLUSION

For the reasons stated herein, Officer Tom Robinson and Officer Robert Tygard respectfully request that the petition for writ of *certiorari* be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 16, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15636

D.C. No. CV-02-00651-ECR

CANDACE LEHMAN; ESTATE OF JOSHUA LEHMAN; LINDA BLOUNT; CAMILIA LEHMAN,

Plaintiffs - Appellees,

v.

TOM ROBINSON; ROBERT ROBINSON,

Defendants - Appellants.

MEMORANDUM*

ON REMAND FROM THE UNITED STATES SUPREME COURT

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appendix A

Before: WALLACE and McKEOWN, Circuit Judges, and CUDAHY, *** Senior Circuit Judge.

This case was remanded to us by the United States Supreme Court following the Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007). Following *Scott*, we asked for supplemental briefing from the parties. In *Scott*, the Court cautioned that we are not required to accept a non-movant's version of events when it is "clearly contradict[ed]" by a video in the record and the accuracy of the video is not disputed. *Scott*, 550 U.S. at 378. Unlike the court of appeals in *Scott*, we reviewed the video that captured the events at issue in this case. The video did not "clearly contradict[ ]" the plaintiffs' version of events.

Because the video does not clearly contradict the version of events recounted by the plaintiffs, and for the reasons stated in our prior memorandum disposition, *Lehman v. Robinson*, 228 Fed. Appx. 697, 2007 WL 1119328 (9th Cir. April 16, 2007), the district court's denial of Robinson and Tygard's motion for summary judgment based on qualified immunity is **AFFIRMED.**

*** The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 16, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15636

D.C. No. CV-02-00651-ECR

CANDACE LEHMAN; ESTATE OF JOSHUA LEHMAN; LINDA BLOUNT; CAMILIA LEHMAN,

Plaintiffs - Appellees,

v.

TOM ROBINSON; ROBERT ROBINSON,

Defendants - Appellants.

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding

Argued and Submitted February 16, 2007
San Francisco, California

Appendix B

MEMORANDUM*

Before: WALLACE, CUDAHY**, and McKEOWN, Circuit Judges.

In this interlocutory appeal, defendant police officers Tom Robinson and Robert Tygard challenge the district court's denial of their motion for summary judgment based on qualified immunity for the shooting death of Josha Lehman. We review the district court's denial of qualified immunity *de novo*, construing all disputed facts in the light most favorable to the party asserting injury, and we affirm. *See, e.g., Beier v. City of Lewiston*, 354 F.3d 1058, 1063 (9th Cir. 2004). Since the parties are familiar with the facts, we will not recite them here except as necessary to explain our reasoning.

Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In analyzing whether a particular official is entitled to qualified immunity, we must address two questions, in a particular order. First, we consider whether the facts alleged show the officer's conduct violated a constitutional right. *See Saucier v. Katz*, 533

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Second, and only if a constitutional right was violated, we consider whether the right was clearly established such that a reasonable officer would believe the alleged conduct was unlawful. *See id.* at 202, 121 S.Ct. 2151. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

The Fourth Amendment prohibits police from deploying lethal force against a suspect who "poses no immediate threat to the officer and no threat to others. . . ." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The Supreme Court has held that it is unreasonable to "seize an unarmed, nondangerous suspect by shooting him dead." *Id.* However, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* We analyze the facts bearing on the threat posed by Lehman with particular attention to "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he . . . actively resist[ed] arrest or attempt[ed] to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

Construed in the light most favorable to Lehman, the facts alleged are that defendant officers Robinson

and Tygard shot and killed Lehman as he sat in his car, with all the tires shot out, surrounded by at least ten armed police officers and numerous police vehicles. Other officers on the scene had instructed all present to hold their fire, and defendants knew Lehman was not armed with a gun. Defendant Tygard testified that he knew Lehman did not have a gun, but only a pocket knife. Another officer present described the knife as "a little folding knife."

Several other officers present testified that they had Lehman "boxed in" when he was shot. One officer said: "[m]y immediate response was just to contain the situation, which we did." When viewed in the light most favorable to Lehman, the record suggests that Lehman had no readily available avenue of escape and was contained.

Lehman was not suspected or accused of any crime. When Officer Klier was asked "the purpose of trying to get him out of the vehicle" Klier stated "we were responding to . . . a suicidal subject." Klier was asked: "Was the point of trying to exit him from the vehicle to talk to him about trying not to kill himself?" Klier responded: "Exactly."

When told to drop his knife and get back in his pickup truck, Lehman partially obeyed, by reentering the vehicle, but not dropping the knife. One of the officers present testified that the negotiating officer "was making progress in talking Lehman into giving himself up." Another officer testified: "communications . . .

seemed to me to be working." Yet another officer stated: "I could tell there was no need for any other gunfire. . . . I didn't want to see that kid get killed."

At the point of the shooting, Lehman had been pepper sprayed and tasered, and at least partially subdued. The area had also been cleared of pedestrians. Officer Slobe testified: "The situation that we had there with the negotiations going on, I felt that it could be-the whole thing could be secured and the suspect taken into custody without the use of force." Officer Giurlani stated: "I was standing right there. I could tell that there was no need for any other gunfire."

In light of all of the facts, construed in the light most favorable to Lehman, when defendants shot and killed Lehman the situation did not require lethal force as confirmed by the testimony of multiple officers on the scene. Therefore, we conclude that defendants' use of force against Lehman was unreasonable and violated his Fourth Amendment right to be free of lethal force unless others' lives and safety are under immediate threat.

In accordance with the second step of the *Saucier* framework, we consider whether the Fourth Amendment right prohibiting the use of deadly force except when the lives and safety of others are seriously imperiled was clearly established in 2002 when defendants shot and killed Lehman. As early as 1996, this court assumed without further comment that "the law governing when an officer may use deadly force against an unarmed fleeing suspect was clearly established. . . ." *Acosta v.*

San Francisco, 83 F.3d 1143, 1147 (9th Cir. 1996) (citation omitted). "[W]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. In 1996, in *Acosta*, this Court held that an officer "shooting at the driver of a slow-moving car" was not entitled to qualified immunity, especially when "a reasonable officer . . . would have recognized that he could avoid being injured by simply stepping to the side." *Acosta*, 83 F.3d at 1146-47.

In *Deorle v. Rutherford*, 272 F.3d 1272, 1285-86 (9th Cir. 2001), we held that even in a non-lethal police shooting under circumstances otherwise similar to those here, the officers were not entitled to qualified immunity. As in Lehman's case, the shooting in *Deorle* occurred in the presence of a large number of police officers, without any "warning of the imminent use of such a significant degree of force," and was directed at a mentally disturbed individual who had "committed no serious offense. . . ." *Id.*

Although we have recognized that "police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving. . . ." *Billington v. Smith*, 292 F.3d 1177, 1184 (9th Cir. 2002) (quoting *Graham v. Connor*, 490 U.S. at 396, 109 S.Ct. 1865), this case is unlike those in which the lone officer is confronted with a violent fleeing felon and is forced to make an exigent split second judgment call. For example, in *Billington*, unlike here, the officer

shot the subject when the officer was "locked in hand-to-hand combat and losing. . . . [The subject] actively, violently, and successfully resisted arrest and physically attacked [the officer] and tried to turn [his] gun against him. . . . [The subject] was trying to get the detective's gun, and he was getting the upper hand." *Id.* at 1185. In contrast, the record here does not reflect a risk of harm to the officers or others commensurate to the risk of harm in cases in which the officers deploying lethal force have been granted qualified immunity.

The cases cited by the defendant officers are all distinguishable in this respect. Unlike the suspect in *Smith v. Freland*, 954 F.2d 343, 344 (6th Cir. 1992), who led police on a chase at speeds in excess of ninety miles per hour and who police believed may have been armed with a gun, Lehman could not travel anywhere quickly, as any reasonable officer could tell from the state of Lehman's completely flattened tires, and the officers had engaged in sufficient verbal negotiations to discern Lehman was armed only with a small knife. The district court distinguished in detail *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004), another case on which defendants rely; we agree with the district court's analysis and do not repeat it here.

The district court's denial of qualified immunity to defendants Robinson and Tygard is AFFIRMED.

APPENDIX C — MINUTES OF CONTINUED HEARING MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, RENO, NEVADA ENTERED MARCH 16, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

CV-N-02-651-ECR (RAM)

MINUTES OF COURT

Date: March 11, 2005

CANDACE LEHMAN,

Plaintiff,

vs.

TOM ROBINSON, et al.,

Defendants.

PRESENT: Edward C. Reed, Jr.,
Senior U.S. District Judge

MINUTES OF CONTINUED HEARING MOTION FOR SUMMARY JUDGMENT (#25):

The Court makes its findings for the record.

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IT IS HEREBY ORDERED that the motion by defendants Robinson and Tygard for summary judgment (#25), on the issue of qualified immunity, is DENIED.

IT IS FURTHER ORDERED that the motion by defendant City of Reno for summary judgment (#25), on the issue of municipal liability for the federal claim, is GRANTED, in respect to the first claim for relief in the complaint.

IT IS FURTHER ORDERED that the motion by defendants for summary judgment (#25), is GRANTED as to all defendants, with respect to the state law claims for battery and outrage, which is also referred to as intentional infliction of emotional distress.

IT IS FURTHER ORDERED that the motion of defendant City of Reno for summary judgment (#25), on the issues of negligent hiring, retention, supervision, and training of the individual defendants and their superiors, is GRANTED.

The Court enters, in summary, the following orders in respect to the defendants' motion for summary judgment (#25):

1) The motion for summary judgment (#25) as to plaintiffs' first claim for relief under section 1983, as to defendants Robinson and Tygard, is DENIED. The motion for summary judgment as to plaintiffs' first claim for relief against the City of Reno, is GRANTED.

2) The motion for summary judgment (#25) by defendants, is GRANTED, as to plaintiffs' second, third, fourth, and fifth claims for relief.

3) Summary Judgment therefore has been GRANTED, as to all claims against the City of Reno, and it is ordered the caption of the case will be modified to eliminate the City of Reno as a defendant, and all further documents will eliminate the City of Reno as a named defendant.

4) The sole remaining claim in the case is the first claim for relief against defendants Robinson and Tygard, individually, pursuant to 42 USC 1983.

5) The motion for summary judgment by defendants, based on the standing of plaintiff Candace Lehman as administratrix of the estate of Josha Lehman, and for summary judgment on the basis of statute of limitations, is DENIED.

The Court finds that Candace Lehman has standing as administratrix to bring the remaining claim, which is the 1983 federal claim contained in the first claim for relief.

The Court further finds that Candace Lehman, individually, Linda Blount, individually, and Candace Lehman, as Guardian of Camilla Lehman, do not have standing to bring the 1983 action, the first claim for relief, which is the only claim which remains in the case.

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Only Candace Lehman, as administratrix of the estate of Josha Lehman, has standing to bring the first claim for relief, the 1983 action, which is the only claim remaining in the case.

At 3:10 P.M. Court adjourns.

LANCE WILSON, CLERK

s/ Colleen Larsen
By Colleen Larsen
Deputy

APPENDIX D — EXCERPTS OF TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT DATED MARCH 12, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE EDWARD C. REED, JR.,
DISTRICT JUDGE

No. CV-N-02-651-ECR(RAM)

MARCH 10, 2005

Reno, Nevada

CANDACE LEHMAN, et al.,

Plaintiffs,

-vs-

TOM ROBINSON, et al.,

Defendants.

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT

[Commencing at page 73]

RENO, NEVADA, FRIDAY, MARCH 12, 2005, 1:00 P.M.

THE COURT: I take it, Ms. Clerk, that Mr. Dickerson is on the telephone; is that right?

THE CLERK: Yes, your Honor, he is.

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THE COURT: Can you hear us all right, Mr. Dickerson?

MR. DICKERSON: Yes, thank you. Good afternoon, your Honor.

THE COURT: And Mr. Skau is present in the courtroom.

The Court is prepared at this time to rule on the pending motion number 25 filed by defendants. This is a motion for summary judgment. We had a hearing on it yesterday, and it was very helpful to the Court.

This case arises out of the shooting death of Josha Lehman by Defendants Tom Robinson and Robert Tygard who are Reno Police Department or RPD police officers employed by the Defendant City of Reno. We may, during the presentation of this order, refer to them collectively as defendants.

On April 24, 2002, defendants shot Josha Lehman dead after he resisted arrest, ran into several police vehicles, refused to exit his truck, and eventually drove his truck in reverse and crashed into a Nevada Highway Patrol car.

[74] The plaintiffs are Linda Blount, who is the mother of the decedent, and Candace Lehman, individually. She is the widow of the decedent. Candace Lehman also appears as guardian of Camilia Lehman, the daughter of the decedent, and as administratrix of the Estate of Josha Lehman, the decedent.

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The complaint asserts federal claims for Fourth Amendment violations under 42 U.S. Code Section 1983, and state claims for battery, negligence, outrage, intentional infliction of emotional distress, and respondeat superior.

On April 19, 2004, defendants filed the motion for summary judgment, number 25, with Exhibits, number 26. The plaintiffs opposed the motion, document number 28, and defendants replied, Document 30.

On December 31, 2004, defendants filed a supplement, number 33, to their motion calling attention of the Court to a Supreme Court decision which overturned a Ninth Circuit decision that had been relied on by both parties. The Ninth Circuit case was *Haugen versus Brosseau,* 339 F.3d 857 (9th Cir. 2003). The Supreme Court case is *Brosseau versus Haugen,* 125 S.Ct. 596 (2004).

This case is very fact intensive, and the evidence presented by the parties on summary judgment is mostly deposition testimony of the officers involved in the events on the fateful day of April 24, 2002. There is also other deposition testimony, for example, testimony by an expert [75] presented by plaintiffs.

On April 24, 2002, Washoe County Sheriff's Office, sometimes referred to as WCSO, Deputy Robert M. Klier responded as backup to Deputy Duncan after receiving a report of a possible suicidal subject on

Paddlewheel, which is a street near U.S. 395 in south Reno. (Deposition of Klier, page 6 and 7.)

When Klier arrived at the scene, he approached the vehicle containing the subject, Josha Lehman. I refer to him sometimes here as the decedent.

The officer noticed that Lehman was "behaving in a very irrational manner." That's from the Klier deposition, page 6.

Officer Klier attempted to subdue Lehman by breaking the truck's driver's side window and spraying Lehman with pepper spray in order to get him out of his truck, which someone, a neighbor we believe, had unsuccessfully attempted to disable the truck. Again, the Klier deposition, page 7.

However, Lehman, that's the decedent, and I may refer to him as just Lehman in the course of this order, was able to start the truck, ram Duncan's Ford sedan and escape from the scene. (Klier deposition, pages 7 and 57.)

As Lehman was driving his truck away from the scene, Klier and Duncan fired shots at the truck's radiator in an attempt to disable the vehicle. (Klier deposition, page 9.)

[76] Although the truck continuing running, the shots did flatten all four of its tires. (Klier deposition, page 13; deposition of Trooper Giurlani, page 28.)

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Duncan reported a 10-78, shots fired, which was broadcast over the Sheriff and Reno Police Department channels. (Klier deposition, pages 12 and 13.)

Duncan and Klier proceeded to pursue Lehman down Paddlewheel and Andrews Lane in Klier's Ford Explorer at approximately 20 miles an hour. (Klier deposition, pages 13, and 55 and 56.)

Nevada Highway Patrol Trooper Sean Girulani, who was responding to the 10-78 call, tried to block the road on Andrews Lane — I think that's Andrew Lane. There was a fire in that area of this past year, and I think it was referred to as Andrew lane. I called it Andrews each time I've said it, but I think it's Andrew lane. It's a well-known street in this area.

Trooper Giurlani tried to block the road on Andrew Lane with his car while standing next to the driver's door of his vehicle.

(Discussion held off the record.)

THE COURT: That's the Klier deposition, page 59, and the deposition of Girulani, pages 25 and 32.

Lehman drove directly toward Girulani, and Girulani fired a round into the windshield. (Giurlani deposition, [77] page 26.)

Lehman swerved to avoid hitting Giurlani at the last second which almost called Lehman to hit Detective

Sergeant Scott Slobe's vehicle which had just arrived on the scene. (Deposition of Klier, pages 59 and 60; deposition of Giurlani, pages 25 and 32; deposition of Slobe, pages 12 and 13.)

Klier then attempted to perform a police intervention tactic known as a PIT stop, where the police car nudges the rear of a fleeing vehicle to one side in an effort to cause the vehicle to spin to a stop, before Lehman could get on Highway 395, but Klier's vehicle was too light to accomplish the PIT stop. (Klier deposition page 14.)

Lehman ran a stop sign and entered U.S. 395 northbound. (Klier deposition, page 56.) On 395, Klier signaled Girulani to attempt a PIT stop. (Klier deposition, page 14.) Girulani radioed to dispatch for permission to perform the possibly dangerous PIT maneuver and received clearance. (Giurlani deposition, page 53.)

Although Girulani had concerns that someone would be hurt or possibly killed by the PIT stop, Girulani successfully performed the PIT stop by causing Lehman's car to cross the southbound lanes of U.S. 395 and come to rest on the side of the road half on the pavement and half on the hard-packed dirt in a culvert west. (Deposition of Girulani, page 28.)

Once Lehman's truck came to a rest, it faced a [78] fenced yard directly to the west. (Deposition of Giurlani, page 28.)

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Klier parked his vehicle on the side of Lehman's truck to the south, and Girulani parked his vehicle without setting the parking brake directly behind the truck of Lehman. (Girulani deposition, pages 9 and 15.) Girulani and Klier approached Lehman's truck, and Klier noticed that Lehman was irrational and was ignoring their demands. (Klier deposition, page 18.)

Klier tried to remove Lehman from the truck through the previously broken driver's side window, but Washoe County Sheriff's Office Deputy Scott Stahl who had followed the chase on his motorcycle yelled, quote, "He has a knife," unquote. (Klier deposition, page 19; deposition of Stahl, pages 6 to 9.) Klier then noticed that Lehman had a 5-inch blade. It was like "a buck knife." (Klier deposition, page 20.) At one point Lehman lunged at Giurlani with the knife. (Deposition of Giurlani page 12.)

Deputy Stahl and Trooper Giurlani began communications with Lehman to try to get him out of the truck. (Giurlani deposition page 9, Klier deposition page 20.)

Lehman looked "irrational, just looking around, not appearing to even hear what Deputy Stahl was saying." (Klier deposition, page 20.) Giurlani stated that Lehman's "eyes were just really wide open." This is a quote from that [79] deposition. "They are that way through the entire encounter . . . they were just really wide open, open wide." (Giurlani deposition, page 12.)

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Lehman was disobeying all Stahl's orders to exit the vehicle and drop the knife, and he also had a crazed look of desperation. (Michael Wright deposition, page 8.) Stahl stated that Lehman "just kept going up and down as far as an emotion level . . . when everybody started showing up on scene, he started really amping up again." (Stahl deposition, page 10.)

Lehman did attempt to leave the truck with his knife at one point, but the officers at the scene told him to drop the knife, and he got back into the truck with the knife. (Deposition of Klier, pages 20, 21.) During these discussions, various officers, including Deputy Wright and Detective Sergeant Slobe, were moving behind Lehman's truck. (Giurlani deposition, page 14.)

Giurlani thought he was making progress in calming Lehman down and told everybody at the scene to, quote, "hold your fire," unquote. (Deposition of Giurlani, page 20.) Slobe observed that Giurlani was making progress in talking Lehman into giving himself up. (Slobe deposition, pages 18 to 20 and 30.)

Two Reno Police Department officers, William Bruton and Mike Magee, as well as Washoe County Sheriff's Deputy Mike [80] Wright, then attempted to use tasers, which are devices that cycle up to 50,000 volts of electricity through the subject. They attempted to use the tasers on Lehman in hopes of subduing him. (Deposition of Giurlani, page 10; Bruton, pages 18 and 19; and Magee, pages 10 and 11.)

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While one prong of the first taser fired by Bruton hit the window and did not work as expected in causing Lehman to freeze up and drop the knife, (Deposition of Bruton, page 13 and 14) the second and third tasers fired by Magee and Wright caused Lehman to tense up, convulse, and attempt to remove the taser wires. (Deposition of Giurlani, page 10 and 18.)

At about this point Reno Police Department Officer Rinaldo attempted to break the driver's side window of Lehman's truck with his nightstick or flashlight in order to try to gain access to the vehicle to subdue Lehman. (Slobe deposition, page 16; Greg Martin affidavit, section 2.)

The facts specifically reflected in the summary judgment submittals with respect to Officer Tygard are as follows.

Officer Tygard served from 1982 to 1988 in the Air Force as a security police specialist and as part of an anti-terrorist team. (Deposition of Tygard, page 7.) Officer Tygard achieved the rank of E5 staff sergeant and was honorably discharged with citations for accommodation, good [81] conduct and meritorious service. (Tygard deposition, page 8.) After a stint working for his family, RPD hired Tygard in December of 1989. (Deposition of Tygard, page 16.)

At this point I want to revert to one additional basic and very important fact here that I did not cover when I was covering the facts generally and before I launched

into consideration of the facts which pertain to Officer Tygard, and I had brought the facts out to the point where the tasers had been employed, if you recall, and the effect of the tasers.

At that point Lehman, the decedent, drove his truck in reverse and crashed into Trooper Giurlani's expedition, a Nevada Highway Patrol cruiser. Defendants RPD Officers Robinson and Tygard at that point fired their weapons and shot Mr. Lehman.

Now, I'm going back to the facts as they pertain to Officer Tygard and Robinson.

The knowledge of and information which officers Tygard and Robinson had are relevant for purposes of determining the reasonableness of their actions, and going on with the facts as they pertain to what happened in regard to Officer Tygard, we state the following.

Officer Tygard testified that he believed that Lehman had an escape route to the north and that many civilians, who had gotten out of their cars, and other [82] officers were in that path. (Deposition of Tygard, pages 42, 47, 59, 62, 63 and 66.)

Tygard was also aware that the Reno Police Department dispatch had used alert tones, which are used for serious calls, that the sheriff's office had broadcast a 10-78, which means shots fired.

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Tygard knew that Lehman's truck had rammed the Washoe County Sheriff's vehicle, and that Lehman's truck had tried to ram the NHP Trooper Giurlani, that there was a pursuit on northbound 395, and that Lehman repeatedly refused to drop the knife and was not compliant. (Deposition of Tygard, pages 17 and 34.)

Tygard listened in on the negotiations with Lehman and heard him refuse to drop the knife and exit the truck as commanded by the other officers. (Deposition of Tygard, page 29.)

After Lehman "looked all around him" to see where the police officers were, Officer Tygard saw Lehman reach up and put his truck in reverse. (Deposition of Tygard, page 41.) Officer Tygard stated that, quote, "it happened very, very quickly . . . [Lehman] stands on the accelerator and comes back and hits the vehicle I'm standing at," unquote. (Tygard deposition, page 63.)

Officer Tygard testified that Lehman's truck was steadily moving the Expedition, that is, the Nevada Highway [83] Patrol cruiser, backwards at the time he shot Lehman. (Deposition of Tygard, pages 39 and 40.) At this point, Tygard testified that he decided to employ deadly force to prevent harm to the officers and citizens to the north of Lehman's vehicle. (Deposition of Tygard, page 66 and 85, 86.)

Officer Tygard has some training in immobilizing vehicles with gunfire, and he knew that no one at the scene had the right kind of weaponry to disable

Lehman's truck. (Deposition of Tygard, page 53 and 54.) Therefore Tygard testified that the only option to prevent Lehman from escaping was to shoot Lehman.

Now, we refer to the facts which relate to Officer Robinson.

Officer Robinson was recently promoted to sergeant. (Deposition of Robinson, page 5.) He was hired in January 1996 and spent three and a half years working in the gang unit and three years on the Special Weapons and Tactics, the "SWAT," team. (Robinson deposition, pages 8, 10 and 11.) As a part of his training, Robinson reviews the use of force general order, including the part — and that's of the Reno Police Department — including the part about deadly force, each year. (Deposition of Robinson, page 10.)

During the standoff, Robinson saw Lehman look around. He thought that Lehman was checking out the location of the various officers around the truck. (Robinson [84] deposition, page 29.) Robinson testified he was primarily concerned that Lehman could use the truck as a weapon and would endanger the lives of civilians and/or the police officers to the north and west of the scene if Lehman escaped. (Robinson deposition, pages 23-24, and 47-48.)

In his post incident interview, Robinson stated he was pretty sure that Lehman was still pressing on the gas pedal when Robinson shot him, but Robinson could

not remember if Lehman's truck was moving or stopped at this time. (Exhibit U, pages 33-34.)

Officer Robinson testified that when he fired his rifle at Lehman, he was aware of the following facts:

One, that the 10-78, the highest emergency an officer can declare, had been broadcast regarding this situation.

Two, the fact that Lehman was waving a knife at the officers.

Three, the danger that the officers behind Lehman's truck were in when Lehman was backing up his truck.

Four, the fact that Lehman's truck had at least two flat tires.

Five, and mistakenly that he thought that Lehman had a gun and had shot at the officers. (Deposition of Robinson, pages 23 to 25, 26 and 31.) Robinson said he was worried about that and worried that Lehman would push the Expedition, [85] the Nevada Highway Patrol cruiser, out of the way, but Robinson did not "give him a chance" to do so. (Deposition of Robinson, page 48.)

Next, I want to cover the Reno Police Department general order on force which is an important part of this record.

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Reno Police Department has a Use of Force policy (referred to as a general order) that,

> "Officers may employ use of force techniques only when necessary and fully justified by the circumstances. Officers may use that degree of force reasonable under the circumstances to protect themselves and/or others or to overcome resistance to their lawful authority." (Exhibit V, page 1.)
>
> The general order also authorizes the use of tasers.
>
> "4. *Taser Device.* Taser devices may be used when officers are unable to establish physical control of an individual, or if an attempt to physically control may constitute an immediate threat to officer safety or the safety of others."
>
> (Exhibit V, page 2.)

Finally, the general order establishes the circumstances in which the police officers can use deadly force.

> [86] "11. *Deadly force.* Deadly force is the application of force which is reasonably likely to cause death. Officers may use deadly force only to protect themselves or others from an immediate threat of death or serious physical

> injury, or to prevent a crime where the suspect's actions place persons in immediate jeopardy of death or serious physical injury . . . These guidelines are to be followed in every instance including a fleeing felon situation. Flight itself does not constitute justification for the use of deadly force absent one or more of the previously cited considerations." (Exhibit V, pages 3 and 4.)

We now address the two-part test for analyzing whether the officers are entitled to qualified immunity: One, whether their actions violated Lehman's Fourth Amendment rights, and, two, if so, whether the Fourth Amendment right that the officers violated was clearly established.

We next announce the standard for summary judgment motions.

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. *Northwest Motorcycle Association versus United States Department of Agriculture,* 18 F.3d 1468 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the [87] light most favorable to the nonmoving party, *Bagdadi versus Nazar,* 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. That's from Federal Rule of Civil Procedure 56 (c) .

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Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. That's Federal Rule of Civil Procedure 50(a).

Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. *Warren versus City of Carlsbad*, 58 F.3d 449 at 441 (9th Cir. 1995).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. versus Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. *Anderson versus Liberty Lobby*, 477 U.S. 242 at 248 (1986).

Although the parties may submit evidence in an inadmissible form, namely, depositions, admissions, [88] interrogatory answers and affidavits, only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. That's Federal Rule of Civil Procedure 56(c); *Beyene versus Coleman Security Services, Inc.*, 854 F.2d 1179 at 1189 (9th Circuit 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: One, it must

determine whether a fact is material; two, it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and, three, it must consider that evidence in the light of the appropriate standard of proof. That is *Anderson,* 477 U.S. 248.

Summary judgment is not proper if a material factual issues exist for trial. *BC versus Plumas Unified School District,* 195 F.3d 1260, 1264 (12th Cir. 1999.)

As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. That cite is for *Anderson.*

Disputes over irrelevant or unnecessary facts should not be considered, citing again *Anderson.* Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and [89] the moving party is entitled to judgment as a matter of law. *Celotex* at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole.

We next address the issue of standing of plaintiffs, particularly making reference here to Candace Lehman in her role as the administratrix of the Estate of Josha Lehman.

As a threshold matter, defendants assert that plaintiffs may not bring claims under 42 USC Section

1983 because "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Moreland versus Las Vegas Metro Police Department*, 159 F.3d 365, 369 (9th Cir. 1998.) However, if the relevant state's law authorizes survival actions, the survivors of an individual killed as a result of an officer's excessive use of force may assert a Section 1983 claim on that individual's behalf. That's citing *Moreland*.

The party seeking to bring a survival action under Section 1983 bears the burden of establishing, one, the state's law authorizes a -survival action; and, two, that the plaintiff meets the state's requirements for bringing a survival action. Again, citing *Moreland*.

Under Nevada law, a cause of action for survival can be brought, but it is limited to the official representatives of an individual's estate. Nevada Revised Statutes 41.100(3), [90] see *Moreland* at 369-70.

The defendants contend that the Estate of Josha Lehman was not timely established at the time of the filing of the complaint and that plaintiffs did not timely move to amend to substitute the Estate as a plaintiff. As such, defendants claim that they were deprived of the benefit of the statute of limitations because plaintiffs were on notice that the Estate was the real party in interest under Nevada law and yet failed to timely create that entity.

However, plaintiffs attached an order which was dated April 23, 2004, of the Second Judicial District

Court of the State of Nevada to their opposition to the motion. This order establishes Candace Lehman as the administratrix of the Estate of Josha Lehman. That's contained in Plaintiff's Opposition Exhibit 12.

Although plaintiffs have not sought to amend the complaint (number 2), which was filed December 13, 2002, to allege the creation of the Estate, it appears that the case should not be dismissed on that basis. The complaint does allege that Candace Lehman is he administratrix of the Estate of Josha Lehman.

I use administratrix because of the gender here of Candace Lehman, but I think the complaint calls her administrator, which is perfectly proper.

Amendment of the complaint is unnecessary in the [91] circumstances. It would not add anything to the case. An amended complaint would simply state the same thing the present complaint states. Candace Lehman does have standing to bring this action as the administratrix of the Estate of Josha Lehman.

While plaintiffs did not act diligently in seeking to create the Estate, the purpose of the statute of limitations appears to be satisfied in this case as defendants were put on notice of the suit and the proper party was finally created. See *American Pipe and Construction Company versus Utah*, 414 U.S. 538, 554 (1974). This case states that statutes of limitations are,

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> "Designed to promote justice by preventing surprises to the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."

In sum, the late creation of the Estate should not bar the Court from reaching the merits of plaintiff's claims for lack of standing because the Estate has been created, albeit after the filing of the complaint, and, as such, the Estate has standing to raise these claims and prejudice, if any, to defendants from the untimely amendment is minor.

We next address the basic law relating to 42 USC Section 1983.

42 USC Section 1983 provides a civil remedy against [92] individuals who, acting under color of state law, deprive a citizen of a Constitutional or federal statutory right. The plaintiff in a Section 1983 action must show two essential elements are present: One, that the conduct complained of was committed by an individual acting under color of state law.

It is undisputed in this case that the action of the officers was under color of state law and therefore the relevant inquiry has to do with the second prong of this test.

Two, that the conduct deprived the person of a right secured by the Constitution or a federal statute. *Parratt*

versus Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds by *Daniels versus Williams*, 474 U.S. 327 (1986).

In evaluating whether defendants are entitled to summary judgment, the plaintiffs's 1983 claim, the Court will have "simultaneously accomplished the first step" under the qualified immunity analysis. See *Perrin versus Gentner*, 177 F.Supp 1115, 1121 (District of Nevada 2001.) Therefore, since the defendants bring their motion for summary judgment on qualified immunity grounds, we now focus our analysis on the Constitutional question under the second prong of the qualified immunity analysis.

The defendants seek summary judgment on the issue of qualified immunity. The Supreme Court has counseled that,

> "A ruling on that issue should be made early in the proceedings so that the costs and expenses of [93] trial are avoided where the defense is dispositive." *Saucier versus Katz*, 533 U.S. 194 at 200 (2001).

Qualified immunity involves "immunity from suit rather than a mere defense to liability," *Id.* quoting *Mitchell versus Forsyth*, 472 U.S. 511, 526 (1985).

Under *Saucier versus Katz*, a court must answer two questions. First, as a threshold matter, the Court must first address the following question:

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> "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a Constitutional right?"

That's citing *Saucier* at 201.

Second, *Saucier* directs that the Court inquire into whether the Constitutional right alleged to have been violated was clearly established. 533 U.S. 201. Under this second *Saucier* step, the relevant inquiry,

> "is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

In this way, qualified immunity acts to protect officers from the sometimes, quote, "hazy borders," unquote, between excessive and acceptable force, and to ensure that officers are on notice that their conduct is unlawful before they are subjected to suit. *Id.* at 206. Therefore, an [94] officer can receive qualified immunity for a reasonable mistake as to the legality of her actions. See *Saucier.*

Furthermore, since,

> "qualified immunity is an entitlement not to stand trial or face the other burdens of litigation," the Court should rule on this issue early in the proceedings so as to avoid the costs and expenses of trial. *Saucier* at 200. In other words, qualified immunity is,

> "immunity from suit rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Saucier* at 200-01.

We now turn to *Saucier* step one, taking the facts in the light most favorable to plaintiffs, has plaintiff shown a Fourth Amendment violation in this case of excessive force.

The Fourth Amendment, as incorporated through the Fourteenth Amendment, protects citizens from "unreasonable searches and seizures." Citing the Fourth Amendment. The use of excessive force by police officers can constitute unreasonable seizures under the Fourth Amendment. See *Graham versus Connor,* 493 U.S. 386 (1989).

An officer may use deadly force when the officer has,

> "probable cause to believe that the suspect poses a threat of serious physical harm either to the [95] officer or to others. *Tennessee versus Garner* 471 U.S. 1 at 11 (1985). Thus, if the suspect threatens the officer with a weapon, or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11-12.

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We next consider in the Fourth Amendment analysis the issue of excessive force, reasonableness and balancing.

Claims of excessive force are analyzed under the Fourth Amendment's reasonableness standard. *Graham*, 490 U.S. at 395. An officer may only use such force as is "objectively reasonable" under the circumstances. *Johnson versus County of Los Angeles*, 340 F.3d 787, 792 (9th Cir. 2003). The determination of whether the use of force to effect a seizure is reasonable under the Fourth Amendment involves a balancing of the nature and quality of the intrusion on the plaintiff's Fourth Amendment interests against the government's interests. *Graham* at 396.

Courts must pay,

> "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the [96] officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Whether or not the use of force was reasonable,

> "must be judged from the perspective of a reasonable officer on the scene, rather than with 20-20 vision of hindsight." *Id.* at 396.

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Courts should also allow for the fact that,

> "'police officers are often forced to make split-second judgments — in the circumstances which are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.'" *Johnson*, 340 F.3d at 792 quoting *Graham* at 396-7.

We now analyze the conduct of Officers Robinson and Tygard on the scene on that day.

Under *Graham*, we must balance the nature of the force against the subject versus the governmental interests involved. 490 U.S. at 396.

The nature of the force in Liris case was indisputably lethal with several rifle shots being fired at Lehman from close range. See *Garner* at 9, ("The intrusiveness of a seizure by lethal force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon.") That is from *Garner*.

[97] Therefore, we must balance the intrusiveness of the seizure by means of lethal force against the governmental interests, including, one, the nature of the crime at issue, two, whether the suspect posed an immediate threat to the safety of officers or others, and, three, whether the suspect is actively evading arrest or attempting to evade arrest. *Graham* at 396.

As to the first factor, Officers Robinson and Tygard knew that shots had been fired because of the 10-78 broadcast, but Robinson mistakenly thought that Lehman had fired at officers. Apparently Officer Tygard originally thought that Lehman had fired shots at officers.

Although the police were originally called to Lehman's aid because he was suicidal and not because he had committed a crime, Lehman likely committed various crimes in running from the police on that occasion by using his car as a deadly weapon. *Cf. Randall versus City of Fairbanks*, F.Supp.2d, 2005, WL 88928 at *3 (District of Alabama 2005) (analyzing the governmental interests at stake in a similar factual scenario and concluding that the government's interest at the first prong, nature of the crime at issue, was limited because, although the suspect had committed felonies while the officers were in pursuit of his car, he had not committed felonies prior to the pursuit and the pursuit did not involve harm in that case to others.)

[98] Robinson also knew that Lehman had a knife and was in a car which is also a deadly weapon.

As for the third factor, whether Lehman was actively evading arrest, Robinson and Tygard knew that Lehman had previously used his truck to ram a Washoe County Sheriff's vehicle and then fled the scene. Lehman was also disobeying orders to exit the truck, brandishing his knife, and exhibiting a suicidal intent.

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When Lehman was shot, both Officers Tygard and Robinson thought that Lehman could escape by either pushing the Expedition out of the way or by pulling forward to the west and north. This weighs in favor of the use of force because Lehman had evaded arrest previously and was actively evading arrest at the time the force was used.

However, it is not disputed that no officer warned Lehman that he would be shot if he drove his truck, see *Deorle v Rutherford,* 272 F.3d 1272, 1283-84 (9th Cir. 2001), (commenting that the "absence of a warning or an order to halt is also a factor that influences our decision," and that officers should provide warnings if feasible.) As I commented at the oral argument, it's very questionable that a warning was feasible in the circumstances that we had here.

It is also not disputed that Officer Robinson knew that Lehman was suicidal which is a consideration weighing against escalation of force. See *Deorel versus Rutherford* at [99] 1283 ("Even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual . . . we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham,* the reasonableness of the force employed.")

However, the dispositive factor in this case is the second factor, that's whether Lehman posed an immediate threat to the safety of the officers or others as perceived by a reasonable officer at the scene. See *Randall*, F.Supp.2d at blank, 2005 WL at *4.

Where the facts are disputed, we are required to view the evidence in a light most favorable to plaintiffs. With regard to the danger issue, the following is evidence which, in a light most favorable to plaintiff, indicates that Mr. Lehman did not pose an immediate threat to the safety of the officers or others.

Number one, there is evidence here that Mr. Lehman was suicidal.

Number two, viewing the evidence in a light most favorable to plaintiffs indicates that the truck was contained [100] or at least difficult to move.

I would comment on these findings this doesn't mean that we are finding these facts to be true. We are required to view this evidence in a light most favorable to the plaintiffs, the nonmoving parties, and so that is the view that we take here in making these findings, but they are very important and critical to our decision.

With regard to containment, the highway patrol vehicle is in back of Mr. Lehman's truck. There was a motorcycle on one side of the truck and there was a fence, downslope and ditch in front of the Lehman vehicle where it was stopped.

Number three, the four tires of Lehman's truck had been shot out.

Number four, in the perception of at least two of the officers at the scene, deadly force was not called for.

Number five, viewing the evidence in a light most favorable to plaintiff, tasers were employed and this might have been the reason Mr. Lehman backed the truck up and that Mr. Lehman was merely reacting to the tasers rather than attempting to evade arrest.

Number six, viewing the evidence in a light most favorable to plaintiffs, the officers in back of the truck had jumped clear when it started to back up.

Number seven, viewing the evidence in a light most [101] favorable to the plaintiffs, the truck was stopped at the time the shots were fired. In this connection, Officer Robinson could not remember if the truck was stopped when he shot Mr. Lehman.

Number eight, viewing the evidence in a light most favorable to the plaintiffs, the officers in the vicinity of the truck were moving out of the way, and those who were in the adjacent areas were moving out of the way. The officers were also moving citizens who might be in the path of the truck out of the way.

Number nine, viewing the evidence in a light most favorable to plaintiffs, the fact that Mr. Lehman backed up doesn't mean he was trying to escape.

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I've noted before, this is number ten, that no warning was given before the shots were fired.

Number eleven, viewing the evidence in a light most favorable to the plaintiffs, Mr. Lehman was acting irrationally.

Number twelve, viewing the evidence in a light most favorable to plaintiffs, there were a large number of officers present. This tends to bolster the conclusion that plaintiff was contained.

And, number 13, viewing the evidence in a light most favorable to plaintiffs, there was no escape route. Considering the undisputed evidence which favors [102] defendants and which we have recited in the course of presenting this order, and the disputed evidence which favors plaintiffs in a light most favorable to plaintiffs, the evidence favorable to plaintiffs is material and significant. It's not merely nitpicking a few odds and ends relating to danger, but casts a significant doubt.

Viewing the evidence in a light most favorable to plaintiffs, Mr. Lehman did not pose an immediate threat of serious physical harm or death to the officers or the others.

I want to place into the record at this point a quotation from *Abraham versus Raso,* 183 F.3d 279 at 289-90 (3rd Cir. 1999.)

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> "Because we are applying this standard on a summary judgment motion, we must address to what extent questions of 'reasonableness' can be resolved on summary judgment. Reasonableness under the Fourth Amendment resembles tort law in its attention to show how a specific, concrete circumstance should affect an officer's judgment. This sensitivity to context suggests that regardless of whether objective reasonableness invokes a different and heightened standard from negligence, reasonableness under the Fourth Amendment should frequently remain a question for the jury. To put the matter more directly, since we lack a clearly defined rule for declaring when [103] conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared."

Therefore, viewing the evidence in a light most favorable to the plaintiffs, the actions of Officers Robinson and Tygard were not reasonable.

Viewing the evidence in a light most favorable to plaintiffs, weighing the government's intrusion against the government's interest, shooting Mr. Lehman was not reasonable. The *Graham versus Connor* test does not bar the action.

We have therefore analyzed the evidence in a light most favorable to the plaintiffs and determined a jury could find that Officers Robinson and Tygard acted unreasonably in shooting Mr. Lehman and therefore violated his Constitutional rights.

Again, I emphasize that I'm not making these findings except viewing the evidence in a light most favorable to plaintiffs. It could be this would come out differently when presented to a jury, but it passes the summary judgment test in our view on the basis stated by the Court.

We then turn to the second *Saucier* test, was the Constitutional right clearly established.

> "The relevant, dispositive inquiry in [104] determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Brosseau versus Hagen*, 125 S.Ct. 596, 599 (2004).
>
> "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau* 125 S.Ct. at 599.
>
> "If the law at the time did not clearly establish that the officer's conduct would

> violate the Constitution, the officers should not be subject to liability or, indeed, even the burdens of litigation." *Id.*

Furthermore, the inquiry into whether the Constitutional right was clearly established must be undertaken "in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

It is clearly established that "use of excessive force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness," citing *Graham* at 386. However, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Id.*, quoting [105] *Anderson versus Creighton*, 483 U.S. 635, 640 (1987).

This is because the *Graham* and *Garner* reasonableness test, like the text of the Fourth Amendment, are cast at a high level of generality. *Brosseau* at 599. While in some obvious cases the *Graham* and *Garner* reasonableness standards can "clearly establish" whether the officer's actions were Constitutional or not at that time, many cases will depend on the facts of that particular case. *Id.*

Brosseau presents a somewhat similar factual situation to this case, but we think the facts here viewed in a light most favorable to plaintiffs are sufficiently distinguishable so that the *Brosseau* conclusion that

there was qualified immunity does not apply in the case now at bar.

Brosseau notes that "in an obvious case, the standards can clearly establish the answer even without a body of relevant case law." *Brosseau* at 599.

Taking the evidence in our case in a light most favorable to plaintiffs, we conclude that it would have been clear objectively to reasonable officers that their conduct was unlawful in light of the situation they confronted. *Craighead versus Lee* __ F.3d __ (2005), WL 36641 at *six (8th Cir. 2005).

In *Brosseau*, the person the officer was attempting to apprehend, Mr. Haugen, was a felon because of previous crimes, unlike Mr. Lehman who had no prior felony convictions [106] disclosed by his record.

Haugen was not known to be suicidal; Haugen's vehicle had not been contained; Haugen's tires had not been shot out; there were no officers at the scene who opined that deadly force was unnecessary in their view; the other citizens in the area, unlike the Haugen situation, had jumped clear of Mr. Lehman's vehicle.

Let me start the last sentence over first commenting that I stated that Haugen was a convicted felon. That is not true. But at the time of the shooting in the *Brosseau* case he had — a no-bail felony warrant had been issued for his arrest which I think bears on our situation here.

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Haugen's vehicle was moving away from the scene at the time of the shooting, unlike our case where, viewing the evidence in a light most favorable to the plaintiffs, the Lehman car, the Lehman truck was contained.

In *Haugen*, there was not a large group of officers present as in our case.

Haugen had an escape route. In our case, viewing the evidence in a light most favorable to the plaintiffs, Mr. Lehman had no escape route.

Brosseau fired only one shot while here Officers Robinson and Tygard fired three to four shots each.

Therefore, viewing the evidence a light most favorable to the plaintiffs, in comparing this case at bar to [107] the facts in *Haugen*, it would have been clear to a reasonable officer in the position of Officers Robinson and Tygard that their conduct was unlawful in the situation they confronted. Therefore, Ms. Clerk, you will enter the order that the motion number 25 —

(Discussion held off the record.)

THE COURT: The order, Ms. Clerk, is that motion number 25 for summary judgment filed by defendants on the issue of qualified immunity for Defendants Robinson and Tygard is denied.

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Next, we turn to the liability of the City of Reno, municipal liability under 42 USC Section 1983.

A local government "may not be sued under Section 1983 for injury inflicted solely by its employees or agents." *Monell versus New York City Department of Social Services*, 436 U.S. 658, 694, (1978). In other words, the local governmental entity can be found liable under Section 1983 only "where the municipality itself causes the Constitutional violation at issue." *City of Canton versus Harris*, 489 U.S. 378, 385 (1989). Otherwise, a local governmental entity would be held liable under *respondeat superior* for merely employing the tortfeasor, which is clearly against Congressional intent in enacting Section 1983. *Monell* 691.

The government entity can only be held responsible under Section 1983 when the injury is caused by the "execution [108] of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* Thus, the first inquiry in a Section 1983 case against a local government is the question whether there is a direct causal link between the local government's policy or custom and the alleged constitutional deprivation. *Canton* at 385.

Although a single constitutional violation ordinarily is insufficient to establish municipal liability, a municipality can be liable for an isolated constitutional violation when the person causing the violation has final policymaking authority. *Webb v Sloan*, 330 F.3d. 1158,

1164 (9th Cir. 2003). However, municipal liability attaches "only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered or done." *Pembau versus City of Cincinnati*, 475 U.S. 469, 481 (1986).

The fact that an official has discretion in the exercise of particular functions "does not, without more, give rise to municipal liability based on the exercise of that discretion. *Id.* at 481-82. The official must also be responsible for establishing "final government policy," respecting such activity before the municipality can be held liable. *Id.* at 482-83.

This ties into the basic claim of ratification here.

[109] In *Pembaur* at 480-81, the Supreme Court held that a single decision by a municipal policymaker may be sufficient to trigger Section 1983 liability under *Monell*. However, there must be evidence of a conscious, affirmative choice by the policymaker. *Id.* Therefore, if the "authorized policymakers approve a subordinate's decision and the basis for it, their ratification" can be chargeable to the municipality because the authorized policymaker's decision is final. *Gillette versus Delmore*, 979 F.2d. 1342, 1347 (9th Cir. 1992) (quoting *City of St. Louis versus Praprotnik*, 485 U.S. 112, 127 (1988).

However, to establish municipal liability under Section 1983, a policymaker must "approve a subordinate's decision and the basis for it before the

policymaker will be deemed to have ratified the subordinates' discretionary decision." *Id.* at 1348.

In this case, plaintiffs argued that RPD Chief Hoover approved of the unconstitutional shooting of Lehman by accepting the recommendation of the District Attorney to not take disciplinary action against Officers Robinson and Tygard, and, therefore, ratified the officers' unconstitutional conduct. Since Chief Hoover is a final policymaker, see *Johnson versus Bradshaw*, 772 F.Supp 501, 505 (District of Nevada 1991), (commenting that Reno's police chief is a "policymaker of the city"), his decision to ratify the [110] unconstitutional conduct of the officers could theoretically result in liability for the city in this case.

However, under the facts of this case, Chief Hoover did not cast his decision to not discipline the Officers Robinson and Tygard as a policy statement, nor does it appear that the decision made has a binding or precedential effect. Furthermore, Chief Hoover ostensibly based his decision to not discipline Officers Robinson and Tygard on a report of Washoe County District Attorney Richard Gammick which concluded that "the homicide was justified."

This record does not indicate that plaintiffs presented any evidence that Chief Hoover actually made a decision. The plaintiffs rely on the fact that Officers Robinson and Tygard were not disciplined to infer that Chief Hoover must have approved the report. Of course, that does not necessarily follow.

Importantly, the Gammick report states that,

> "Lehman then put the pickup in reverse and rammed the Highway Patrol car. On the Highway Patrol videotape of the incident, at least five officers can be seen in the immediate vicinity of the pickup. All of them appear to be in harm's way."

That's from District Attorney Gammick's recommendation to Chief Hoover. That statement comes from there.

[111] Therefore, it does not appear that Chief Hoover either established policy or approved of the officers' decision to shoot and the basis for that decision. At most, Chief Hoover merely approved of the decision of the officers' decision to shoot Lehman based on Gammick's report, which stated that the officers were in harm's way.

The incident as reported to Chief Hoover does not constitute unconstitutional conduct and, therefore, Chief Hoover cannot be said to have made an "affirmative, conscious" choice to ratify the officers' alleged unconstitutional conduct. That comes from *Pembaur* at 480-81. To hold otherwise would effectively impose *respondeat superior* liability on the City for the officers' actions.

We therefore conclude that the City is entitled to summary judgment on the issue of municipal liability from the federal claim. The claim of ratification of the

officers' acts by the city policymaker, the chief of police, fails. The evidence does not support that there is ratification of the officers' conduct.

Defendants move for summary judgment on the claim that the City is liable for failure to train.

In *Canton*, the Supreme Court held that a failure to train could serve to establish the fault of a municipality, but the Court outlined a rather high degree of proof to satisfy the inquiry, thus deliberate indifference. *Id.* at [112] 388. That's *Canton*. Therefore, to impose liability under Section 1983 a plaintiff must show that, (1) the governmental entity had a policy, (2) that the policy amounted to deliberate indifference to the plaintiff's constitutional right, and (3) that the policy was a moving force behind the violation. *Oviatt versus Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992).

The *Canton* court commented that a city is liable under Section 1983 for failure to train "only where the failure to train amounts to deliberate indifference to the rights of persons with whom its employees come into contact." *Id.* at 388.

A governmental entity is "deliberately indifferent" if,

> "The need for more or different training is so obvious, and the inadequacy so likely to result in the violation of Constitutional rights, that the policymakers of the city can

> reasonably be said to have been deliberately indifferent to the need." *Id.* at 390.

Such a situation can occur when government officers,

> "In exercising their discretion, so often violate the constitutional right that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are [113] deliberately indifferent to the need." *Id.* at 390, note 10.

The fact that a state actor is inadequately trained is not in itself sufficient to establish "deliberate indifference" because other factors might caused the actor's shortcomings. *Id.* at 390-91. Nor is it sufficient that more or better training could have avoided the particular injury causing the conduct. *Id.* at 391. Furthermore, the plaintiff must show that the deficiency in training is closely related — actually caused — the injury.

In this case, it appears the situation at the scene was chaotic, and that the officers perhaps did not act wisely in escalating the force against the potentially mentally disturbed Lehman. See *Herrera*, 298 F.Supp.2d at 1052 (concluding that the plaintiff had presented enough evidence in that case to show that police training on dealing with mentally disturbed individuals and shooting projectiles was inadequate.)

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There is no evidence presented in this record to support a claim against the City for an unconstitutional policy regarding failure to train.

(Discussion held off the record.)

THE COURT: We'll take a very short break.

(A recess was taken.)

THE COURT: We're ready to proceed, please.

[114] The claim is not entirely clear as to the extent of that claim, but we take it here to include, as does a later state claim, not only training, but hiring, retention and supervision of Officers Robinson and Tygard and their superiors. Nor does the evidence show that any such claimed policy was the reason for the injuries suffered by Mr. Lehman.

We conclude that the City is entitled to summary judgment on the issue of municipal liability because of failure to train, hire, retain, or supervise Officers Tygard and Robinson and their superiors.

Therefore, Ms. Clerk, you will enter the order of the Court that defendants' motion for summary judgment, number 25, filed in behalf of the City of Reno with respect to the first claim for relief in the complaint, is granted.

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We next address the pendent state claims, the second through fifth claims for relief in the complaint.

In this case, the plaintiffs have brought a separate cause of action for *respondeat superior* as a separate claim. It appears, however, from the pleading and all of the documents filed that this is merely a theory by which to hold the City of Reno liable for its officers' torts, and it is not truly a separate claim.

In Nevada, the state is not liable for the torts committed by its employees outside of the course and scope of their employment. And here I'm referring to the City as well. [115] That's NRS 41.03475 (2001).

> " "*Respondeat superior* liability attaches only when the employee is under the control of the employer and when the act is within the scope of employment." *Molino versus Asher,* 618 P.2d 878, 879 (1980).

An act of an employee is not within the scope of employment,

> "If it is done with no intention to perform it is a part of, or incident to, services on account of which he is employed." *Hallett versus United States,* 877 F.Supp 1423 (District of Nevada 1995) (quoting Restatement (Second) Agency, section 235 (1958)).

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> "If the employee's tort is truly an independent venture of his own and not committed in the course of the very task assigned to him, the employer is not liable." *Prell Hotel Corp. versus Antonacci,* 469 P.2d 399, 400 (Nevada 1970).

An employer can be held liable for both the negligent and intentional acts of its employees. *Switzer,* 174 F.Supp. 2d 399 at 1106. However, in order for an employer to be held liable for the intentional torts of its employee, the tort must be committed "in the course of the very task assigned to the employee." *Rockwell versus Sun Harbor Budget* [116] *Suites,* 925 P.2d 1175, 1180 (Nevada 1996) (citing *Prell* at 400).

Generally, the question of whether an employee acted within the scope of employment is one of fact. Id. Nevertheless,

> "Where undisputed evidence exists concerning the employee's status at the time of the tortious act, the issue may be resolved as a matter of law." *Id.* (citing *Evans versus Southwest Gas,* 842 P.2d 719, 721 (Nevada 1992.)

The leading case in Nevada holding an employer liable for the intentional tort of its employee is *Prell Hotel Corporation versus Antonacci,* which I have cited above. In *Prell,* a blackjack dealer punched a guest after

being called a "hateful, degrading name." 469 P.2d at 400. After being called the name,

> "The dealer 'dealt one card to each player all the way around, and then just like this he hit him, very spontaneously, no warning of any kind.' "

I'm quoting there from *Prell.*

The Court found the casino liable for the dealer's intentional tort because it occurred "within the scope of the very task assigned to him." *Id.*

Relying on *Prell,* we similarly found that a school district could be held liable for the actions of one of its [117] teachers in fondling a young student in *Doe versus Estes,* 926 F.Supp 979 (District of Nevada 1996.)

In this case, the officers clearly were acting in the course and scope of their employment when they shot Mr. Lehman. Both officers responded to the 10-78 call, and both officers shot Mr. Lehman ostensibly to prevent danger to other officers and the public. Therefore, if the officers are liable to plaintiffs for an intentional tort, the City of Reno is liable pursuant to the doctrine of *respondeat superior.*

We next deal with the claim of battery.

Liability for battery results where the defendant (1) intended to cause a harmful or offensive contact, and (2)

such contact did occur. *Switzer versus Rivera*, 174 F.Supp.2d 1097, 1109 (District of Nevada 2001), (citing the Restatement (Second) of Torts, sections 13 and 18.) A battery is also defined as "any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent." *Wright versus Starr*, 42 Nevada 441, 447, 179. *Pacific* 877, 878-79 (1919).

If a police officer uses more force than is reasonably necessary to make an arrest, he can be held liable for battery. See *Yada versus Simpson*, 913 P.2d 1261, 1262 (Nevada 1996).

Although battery as mentioned below will fail as a claim because of discretionary immunity, battery standing by [118] itself would otherwise appear to survive summary judgment.

We next consider the claim of outrage.

To establish a cause of action for intentional infliction of emotional distress, thus outrage, a plaintiff must show: (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress, and (3) actual or proximate causation. *Olivero versus Lowe*, 116 Nevada 395, 398, 995 P.2d 1023, 1025, (2000).

> "Extreme and outrageous conduct is that which is 'outside all possible bounds of decency' and is regarded as 'utterly

> intolerable in a civilized community." *Switzer,* at 1097 — the cite is to 1108, quoting *Maduike versus Agency Rent-A-Car,* 114 Nevada 1, 4, 953 P.2d 24, 26 (1998).

Even taking this evidence in a light most favorable to plaintiffs, we conclude that the conduct of Officers Robinson and Tygard was not outside all possible bounds of decency and utterly intolerable in a civilized society. The officers were faced with a tense standoff with an armed and mentally disturbed individual who had previously used his truck as a weapon. Their conduct cannot be classified as extreme and outrageous and outside all possible bounds of decency.

[119] We therefore conclude that defendants will be entitled to summary judgment on the issue of outrage, intentional infliction of emotional distress.

We next address the issue of discretionary immunity.

Notwithstanding possible liability for state law claims, defendants argue that their conduct is shielded from liability for plaintiff's state claims pursuant to NRS 41.032. NRS 41.032 provides for immunity for officers performing discretionary actions:

> "No action may be brought against . . . an officer or employee of the state or any of its agencies or political subdivisions which is: 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary

> function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused."

Under Nevada law, the key distinction appears to be whether the act is discretionary, or merely an ministerial or operational in nature. See, for example, *Falline versus GNLV Corp.*, that's Golden Nugget of Las Vegas, 107 Nevada 1004, 1009, 823 P.2d 888, 891 (1991).

The Nevada Supreme Court has stated that "personal [120] deliberation, decision and judgment are requirements of a discretionary act." *Parker versus Mineral County*, 102 Nevada 593, 595, 729 P.2d 491, 493 (1986). See also *Herrera*, 298 F.Supp at 1054 (adopting similar definition).

The proper handling of a precarious situation with an armed, disturbed man in a large vehicle, which has previously been used by the suspect to ram police vehicles, "required the officers to continually assess the changing situation and improvise as they proceeded." *Herrera* at 1054. In other words, such a decision involved the use of the officer's discretion. See Id. Therefore Officers Tygard and Robinson are immune from suit because they acted under their discretion in firing at Mr. Lehman.

Plaintiffs argue that the discretionary immunity doctrine does not shelter the bad faith exercise of

judgment. *Wayment versus Holmes*, 112 Nevada 232, 238, 912 P.2d 816, 820 (1996). The Nevada Supreme Court has defined "bad faith" as "the absence of a reasonable basis for acting" and "the defendant's knowledge or reckless disregard of the lack of a reasonable basis" for so acting. *Falline* at 1009.

However, *Falline*, which establishes the bad faith exception to discretionary immunity, further defines the bad faith exception vis-a-vis the abuse of discretion standard embedded in NRS 41.032. 107 Nevada at 1009, note 3, 823 P.2d at 892, note 3. The *Falline* court explained that an "abuse of [121] discretion" necessarily involves the authority to so act in the first place whereas "bad faith occurs outside the circumference of authority." *Id.* In other words,

> "An abuse of discretion is characterized by an application of unreasonable judgment to a decision that is within the actor's rightful prerogatives, whereas an act of bad faith has no relationship to the rightful prerogative even if the result is ostensibly within the actor's ambit of authority."
>
> *Id.*

In this case, the officers had the authority to use deadly force to contain Mr. Lehman "to protect themselves or others from immediate threat of death or serious physical injury." (See General Order, copy attached to Motion For Summary Judgment, Exhibit V.)

While the officers' decision to use that force may prove to be unreasonable, they were still "authorized" to use that force and are immune from suit if they simply abused their discretion and thus made a mistake. NRS 41.032.

There is no evidence in the record that their conduct rose to the level of bad faith, thus the absence of a reasonable basis to shoot Lehman and the reckless disregard for the lack of a reasonable basis for shooting Mr. Lehman.)

NRS 41.032 protects officers who make an error of judgment, which is the worst that can be said that Officers [122] Robinson and Tygard did in this case.

Therefore, Officers Robinson and Tygard and the City of Reno are immune from plaintiff's state law claims for battery and intentional infliction of emotional distress (outrage) under the doctrine of discretionary immunity.

Ms. Clerk, you will enter the order of the Court that defendants' motion for summary judgment, number 25, is granted as to all defendants with respect to the state law claims for battery and outrage, or intentional infliction of emotional distress.

We next consider the state claim against the City of Reno for negligent hiring, retention, supervision and training of the individual defendants and the superiors of the individual defendants.

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Plaintiffs' complaint alleges that the defendant City of Reno was negligent in "hiring, retention, supervision and training" of Officers Robinson and Tygard and their superiors. Notwithstanding the fact that plaintiffs did not oppose this portion of defendants' original motion for summary judgment, we find there is no evidence in the record as to several of these claims.

Under Nevada law, a plaintiff must generally show the following elements to succeed on a claim for negligence: (1) the defendant had a duty to exercise due care toward the plaintiff; (2) the defendant breached that duty; (3) the [123] breach was an actual cause of the plaintiff's injury; (4) the breach was the proximate cause of the injury; and (5) the plaintiff suffered damage. *Perez versus Las Vegas Medical Center,* 805 P.2d 589 at 590-91 (Nevada 1991); see generally *Jones versus Wells Fargo,* 5 Cal. Rptr. 3d 835,846 (California 2003) (commenting that the proper pleading of negligence requires allegations of "traditional elements of tort: duty, breach, causation and damages").

First, there is no evidence as to possible negligence in the hiring of these officers. Second, although there is some evidence that the officers did have complaints filed against them for excessive force and other violations, there is no indication how this breach of the duty of due care, thus why the Reno Police Department should have fired them, and how this breach caused Mr. Lehman's injuries. Third, there is no evidence as to faulty supervision and/or failure to train.

Therefore, Ms. Clerk, you will enter the order of the Court that the defendant's motion number 25 for summary judgment on the issues of negligent hiring, retention, supervision and training of the individual defendants and their superiors is granted.

This is a state claim against the City of Reno. I think it's also useful, Ms. Clerk, then, for you to show — our minutes will reflect the following with regard to the [124] motion for summary judgment, number 25.

Number one, motion number 25 for summary judgment as to plaintiff's first claim for relief under Section 1983 as to Defendants Robinson and Tygard is denied. The motion for summary judgment, number 25, as to plaintiff's first claim for relief against the City of Reno is granted.

Number two, the motion for summary judgment, number 25, by defendants is granted as to the plaintiff's second, third, fourth and fifth claims for relief.

Number three, summary judgment therefore, Ms. Clerk, has been granted as to all claims against the City of Reno. It is ordered that the caption for the case will be modified to eliminate the City of Reno as a defendant. All future documents filed in the case will eliminate the city as a defendant.

Number four, the sole remaining claim in the case is the first claim for relief against Defendants Robinson

and Tygard individually pursuant to 42 USC Section 1983.

Number five, the motion for summary judgment by defendants based on standing of Plaintiff Candace Lehman as administratrix of the Estate of Josha Lehman and for summary judgment on the basis of the statute of limitations is denied.

(Discussion held off the record.)

THE COURT: This will be just a minute here, there's one wrinkle I want to iron out if I can, please.

[125] (Discussion held off the record.)

THE COURT: There is one wrinkle that I want to show in the minutes here that appear to be useful if we made a ruling on it at this time. This has to do with the standing questions.

It is quite clear, as I stated in the order, that Candace Lehman has standing as administratrix to bring the remaining claim which is a 1983 federal claim contained in the first claim for relief.

Ms. Clerk, I'd like that to show up in the minutes.

We're dealing solely with the remaining federal claim now which is the only claim left in the case. It appears to the Court that Candace Lehman, individually, Linda Blount, individually, and Candace Lehman as guardian

of Camilia Lehman, do not have standing to bring the 1983 action, the first claim for relief, which is the only claim that remains in the case.

I thank counsel for your patience. That's quite an undertaking to announce this decision. As you can see, we've used as much care as we could use in considering all aspects of this case, and this is not an easy case, it is one that involves very difficult issues, the most difficult issue, obviously, being the one involving the two officers in shooting Mr. Lehman.

But our conclusion was that this was a viable claim, [126] that summary judgment should not be granted for qualified immunity to the two officers, and my order recites that.

And we thank you again, and we are in recess.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 5, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15636

D.C. No. CV-02-00651-ECR
District of Nevada, Reno

CANDACE LEHMAN; ESTATE OF JOSHUA LEHMAN; LINDA BLOUNT; CAMILIA LEHMAN,

Plaintiffs - Appellees,

v.

TOM ROBINSON; ROBERT ROBINSON,

Defendants - Appellants.

ORDER

Before: WALLACE, CUDAHY,* and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for rehearing and rehearing en banc. Judge McKeown votes

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

to deny the petition and Judge Wallace and Judge Cudahy so recommend. The full court has been advised of the petition and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and rehearing en banc is denied.